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IN THE

Supreme Court of the United States

October Term, 1955

No. 165

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,

Appellant,

vs.

STATE OF MINNESOTA, ORDER OF RAILWAY CONDUCTORS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF RAILROAD AND STEAMSHIP CLERKS, THE JOINT LEGISLATIVE BOARD and THE RANGE MUNICIPALITIES AND CIVIC ASSOCIATION,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

STATEMENT AS TO JURISDICTION

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In compliance with paragraph 2 of Rule 13, appellant submits the following statement as to jurisdiction.

OPINION AND JUDGMENT BELOW

The opinion of the Supreme Court of the State of Minnesota (hereinafter the "State Supreme Court"), filed February 24,

1956, is not yet officially reported but appears at 75 N. W. 2d 398 and a copy is appended hereto as Appendix A, at page 25 hereof. A copy of the final judgment (not reported) of that Court dated and entered March 20, 1956, from which this appeal is taken is appended hereto as Appendix B at page 47.

That final judgment affirmed a lower court judgment in the District Court of the State of Minnesota, County of St. Louis (hereinafter the "District Court"). Copies of the District Court judgment entered on February 21, 1955 (not reported) and of the memorandum opinion and order (not reported) of the District Court dated January 11, 1955, and entered January 12, 1955, are appended hereto as Appendices C and D at pages 49 and 50.

The judgment of the District Court affirmed an order (not reported, hereinafter the "1953 order") of the Railroad and Warehouse Commission of the State of Minnesota (hereinafter the "Commission") dated October 6, 1953. The text of that order is set out verbatim under the heading "Statute" at page 4 hereof. Copies of the Report, Findings of Fact, and Conclusion (not reported) accompanying the 1953 order are appended hereto as Appendix E at page 62.

A copy of an order (not reported) of the State Supreme Court, entered on March 15, 1956, granting a stay of enforcement of the Commission's 1953 order pending this appeal, is appended hereto as Appendix F at page 83.

Appellant believes reference to the Commission's earlier Report, Findings of Fact, Conclusion and Order (not reported) of November 7, 1952 (hereinafter the "1952 order"), is necessary to a consideration of the final judgment. Accordingly, copies are appended hereto as Appendix G at page 84.

GROUNDS ON WHICH JURISDICTION IS INVOKED

On the grounds of denial of due process, appellant seeks review of the final judgment, dated and entered March 20, 1956, of the State Supreme Court affirming the judgment of the District Court, which had affirmed the Commission's 1953 order. That order directed appellant to establish prescribed passenger train and bus service between certain points. The Commission had previously authorized appellant to discontinue services between the same points by its 1952 order. Proceedings in the Minnesota courts to set aside the 1953 order were brought pursuant to Minnesota Statutes Annotate, Section 216.25. The Minnesota Courts upheld the constitutional validity of the Commission's legislative action and rejected appellant's arguments that it had been denied the fair hearing required by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States. Notice of Appeal to this Court from the final judgment of the State Supreme Court was filed therein on April 23, 1956.

Jurisdiction of this appeal is conferred by Title 28 U. S. Code § 1257(2).

Many cases, including the following, sustain jurisdiction: *Lake Erie & W. RR. Co. v. State (Ill.) Pub. Util. Comm.*, 249 U. S. 422 (1919); *Bluefield Water Works & Improvement Co. v. Public Service Commission of W. Va.*, 262 U. S. 679 (1923); *Market Street Railway Co. v. Railroad Comm. of Calif.*, 324 U. S. 548 (1945); *Atchison, Topeka & Santa Fe Ry. Co. v. Pub. Util. Comm. of Calif.*, 346 U. S. 346 (1953).

STATUTE

The legislative act, the validity of which is here under attack, took the form of the Commission's 1953 order, issued in the exercise of the Commission's delegated legislative authority. It reads as follows:

"Order.

"That the Duluth, Missabe and Iron Range Railway Company be and it is hereby ordered to re-establish passenger train service afforded to the public prior to May 15, 1953, by the restoration of the operation of Passenger Trains Nos. 1, 2, 11, 12, 14 and bus service contributory to Trains Nos. 1 and 2 between Wilpen and Buhl, Minnesota.

"It Is Further Ordered that the Respondent place in effect the following time schedule:

"That one passenger train leave Hibbing, Minnesota, not later than 7:30 a.m.

"That one passenger train leave Duluth not earlier than 5:30 p.m.

"It Is Further Ordered that the time schedule of Passenger Trains Nos. 11, 12 and 14 and bus service contributory to Nos. 1 and 2 between Wilpen and Buhl, Minnesota, be co-ordinated with the schedule of Trains Nos. 1 and 2.

"It is Further Ordered that the Respondent reduce the running time of said trains so that the total time consumed in the operation of said trains between Duluth and Hibbing be not more than two hours and fifteen minutes.

"It Is Further Ordered that said passenger train service be re-established not later than November 1, 1953."

QUESTIONS PRESENTED BY THE APPEAL

1. Did bias, hostility, misconduct and prejudgment in the Commission so pervade the proceedings before it and its Report, Findings of Fact and Order, reviewed by the State Supreme Court, as to deny to the appellant the fair hearing required by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States?

2. In the face of the conclusions of the State Supreme Court that a member of the Commission who participated in the hearings and determination, and without whose vote the Commission would have been equally divided and could not have issued the 1953 order, manifested an attitude of hostility toward appellant throughout the proceedings and was guilty of misconduct of which "no fairminded court can approve" and "which should be condemned by any court," did that Court err in holding that the appellant was not denied the fair hearing required by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

By an application (pursuant to Minnesota Statutes Annotated, Section 216.62), dated March 5, 1952, appellant sought from the Commission authorization to discontinue daily passenger train service along intrastate routes between Duluth and the terminal villages of Hibbing and Virginia and certain contributory bus service between the villages of Wilpen and Buhl. (Vol. I, p. 5)* Public hearings were held on June 17, 18, 19 and 20, 1952, before the three-man Commission, then comprised of Ewald W. Lund, Chairman, Elling A. Knutson and Clifford C. Peterson. (Vol. II, pp. 1-587) Discontinuance of the service, effective May 15, 1953, was approved by the Commission by a majority of two to one, Commissioner Peterson dissenting. (Vol. I, pp. 10-28)

The Commission's 1952 order included detailed findings, among them that (i) increased bus and private automobile travel had so reduced passenger travel on appellant's lines in question that the service was no longer either substantially used or needed by the public; (ii) discontinuance of such passenger service would inconvenience a limited number of persons and would not result in material injury to the public; (iii) there was no indication that the passenger service in question could be made to pay its operating costs; (iv) notwithstanding appellant's adequate rate of return on over-all operations, the public would not benefit from continued absorption by freight operations of the passenger losses; and (v) public convenience and necessity would be reasonably and adequately served by bus service and private automobiles. (Vol. I, pp. 11-19)

*References are to the volumes of the printed record before the State Supreme Court, copies of which are being submitted to the Clerk of this Court.

Shortly after the issuance of the 1952 order, Paul A. Rasmussen replaced Commissioner Knutson on the Commission as a result of an election in November 1952. In December, the newly constituted Commission heard an application filed by a protestant for rehearing or modification of its 1952 order and findings. (Vol. I, pp. 28-43; Vol. II, pp. 587-639) The Commission issued no order on this application and so when thirty days had elapsed the 1952 order became final. (Minnesota Statutes Annotated, § 216.25)

It is the cumulative effect of what the Commissioners said and did in the subsequent proceedings that demonstrates the grievous denial of due process. The actions of the reconstituted Commission were permeated with bias, hostility and misconduct of such a nature as to deprive appellant of due process of law. Appellant's brief on the merits will set forth in detail illustrations thereof. For the purpose of this Statement a few instances are set out to suggest the prejudice which prompted the Commission to reopen the question of appellant's passenger service and the prejudicial atmosphere in which the whole matter was reheard and redecided.

On April 15, 1953, exactly one month prior to the date set by the Commission's 1952 order for termination of the passenger service in question, the Commission, on its own motion, ordered appellant to show cause why it should not be required to "re-establish" the services it had not yet ceased to operate. A hearing was set for May 1, 1953, in the village of Hibbing. (Vol. I, pp. 43-5)

At the opening session on May 1, 1953, Commissioners Peterson and Rasmussen, the latter then Chairman, were the only members of the Commission in attendance. Chairman Rasmussen announced that Commissioner Lund would be absent from the hearings on the advice of his doctor but that,

after studying the transcript and exhibits, he would participate in the decision and the order which the Commission would issue. (Vol. II, pp. 641-2)

Without awaiting the introduction of any evidence, Commissioner Peterson announced to counsel for appellant at the opening session:

> "I also would like to say, at this time, that our next regular business meeting, which will no doubt be Monday, Mr. Stevens, the Commission will issue an ex parte order that will move to continue these trains on for an indefinite time until the Commission has heard this complete hearing of this new proceeding." (Vol. II, p. 651)

Following this pronouncement, appellant commenced the presentation of its case. It had scarcely begun when it was asked to yield to an intervenor. Thereupon, eleven witnesses opposed to the 1952 order were trooped through the proceeding to testify briefly in favor of continuing the service. Their testimony was essentially cumulative of the testimony presented in opposition to discontinuance of the service at the 1952 hearings. (Vol. II, pp. 675-6, 699-816)

Toward the end of the opening session, Chairman Rasmussen stated that he had discussed with Commissioner Peterson the latter's pronouncement as to the issuance of an ex parte order and they wished to have it made clear "as far as the record is concerned" that the Commission would not issue an arbitrary order. (Vol. II, pp. 815-16) Shortly after this assurance was given, Chairman Rasmussen adjourned the hearings to May 11, stating that it would be impossible to conclude without further sessions. (Vol. II, p. 835)

In total negation of that assurance and in excess of what the Commission later admitted was the limit of its power (Vol. I, p. 82), the Commission on May 6, 1953, before the

adjourned date, issued an "Ex Parte Emergency Order" requiring appellant "to re-establish the passenger service." (Vol. I, pp. 45-9) This "Ex Parte Emergency Order" relied on the fragmentary testimony adduced from the opposition witnesses at the May 1, 1953, session stating,

> "a number of witnesses having testified that public convenience and necessity requires the continuation of the operation of the passenger trains herein referred to and it appearing that a large number of witnesses who were prepared to testify for the continuation of said trains but could not be heard and the Commission having continued the hearing * * *
>
> "Whereas, it appears to the Commission that a discontinuance of said passenger trains may discommode many segments of the population between Duluth and various Range towns and cities, and may create an undue burden upon the public convenience and necessity and will result in the discontinuance of express and delivery of mail by rail and may cause irreparable damage to the people and businesses affected by the discontinuance of said trains,
>
> "Now, Therefore, on the foregoing facts and on the Commission's own motion, it being determined that an emergency exists, and that the respondent herein should be required to re-establish service on passenger trains Nos. 1, 2, 11, 12 and 14 * * *." (Vol. I, pp. 46 and 47)

Commissioner Lund dissented, stating that the Commission had given full consideration to the evidence of public convenience and necessity incident to passenger train service offered during the 1952 hearings, that "no new evidence has been submitted which justifies a reinstatement of these passenger trains," and that no emergency existed. (Vol. I, pp. 48-9)

This whole course of conduct by the Commission is explained by the statement of the Secretary for the Commis-

sion, in his subsequent brief before the Commission urging operation of the passenger service, that prior to May 1, 1953,

> "* * * the Commission made a preliminary investigation by visiting and conferring with interested parties in most of the cities and towns affected by the November 7, 1952, order. It was quite evident that a large number of people desired to present their testimony so that the Commission would have before it a more complete picture of the needs and convenience of the public than were apparently presented at the hearings held prior to the November 7, 1952, order." (Vol. IV, pp. 94-95)
>
> "* * * The Commission * * * determined that there was reasonable cause to believe that the company should be required to re-establish the service that said company was permitted to discontinue by the order of the Commission * * *." (Vol. IV, p. 83)

Appellant commenced immediately an action in the District Court to enjoin enforcement of the "Ex Parte Emergency Order." On May 8, 1953, the District Court issued an order to show cause restraining enforcement of the "Ex Parte Emergency Order." On May 14th, after a hearing, the District Court issued a temporary injunction against enforcement of the "Ex Parte Emergency Order." The passenger service was discontinued on May 15, 1953, on the authority of the Commission's 1952 order. It has not been resumed because enforcement of the 1953 order has been successively stayed. On September 15, 1953, the Commission, on its own motion, vacated the "Ex Parte Emergency Order" as beyond its jurisdiction. (Vol. I, pp. 81-2, 99; Vol. III, p. 1202) The Commission's 1953 order followed on October 6, 1953.

The episode referred to above, involving the interruption of appellant's case to permit presentation of opposition witnesses, was accompanied by the Commission's sanctioning

of a procedure reminiscent of the long-discarded Anglo-Saxon reliance on "oath helpers." A group of these persons had arrived in Hibbing by train at 11:38 a.m., with the announced intention of departing on the 1:15 p.m. train. After only one of them had testified, Commissioner Peterson suggested that the group be sworn *en masse* and that counsel for an intervenor then select one person from each town to testify in order to hasten the presentation of the case against appellant.

Counsel for appellant objected to this procedure as "being lack of due process" and denying to appellant the right to cross-examine. He suggested for the accommodation of members of this group that hearings be arranged at convenient places along appellant's right of way so that each person could be heard fully. His objection was sustained only long enough for several more witnesses to be heard. When it became apparent that not all of the group could be heard in the brief time then available, Chairman Rasmussen directed counsel for the Commission to record the names of all such persons who had not testified. A motion on behalf of appellant to strike the twenty-eight names so entered on the record was overruled with an assurance by Chairman Rasmussen that no inference would be drawn as to what testimony these persons would have given. (Vol. II, pp. 699-743)

Contrary to this assurance, the Commission relied five days later in making its above-mentioned "Ex Parte Emergency Order" upon what it concluded would have been the substance of testimony by these persons:

> "Whereas * * * it appearing that a large number of witnesses who were prepared to testify for the continuation of said trains but could not be heard * * *." (Vol. I, p. 46)

This characterization was repeated in the brief of the Secretary of the Commission, in which he urged that the 1953 order be made. (Vol. IV, pp. 98-9) Further, the Commission's Report and Findings of Fact accompanying its 1953 order stated:

> "Twenty-four witnesses testified on behalf of the intervenors in support of the Commission's Order to Show Cause. Some of these witnesses represented business interests and others were individuals interested in the reestablishment of the above mentioned passenger train service. Many more witnesses who came to the hearing on May 1st from various towns who will be affected by the decision in this proceeding could not be heard because each of them had to return to their respective towns by rail by 1:15 p.m., the time that Train No. 2 leaves Hibbing for Duluth. Train No. 1 arrives at Hibbing at 11:38 a.m. This allowed only one hour and thirty-seven minutes for these witnesses to testify. These witnesses desired to testify, but in order to do so it would have been necessary for them to stay overnight and take Train No. 2 back to their respective towns the following day." (Vol. I, p. 51)

The extent of Commission's hostility to witnesses who gave testimony helpful to the appellant's position is well illustrated in the case of the District Superintendent of the United States Postal Service, Mr. Ahlquist. The substance of his testimony was that the establishment of "star routes" (truck carriage of mail) had been requested by citizens in preference to the rail service, would be more efficient and rapid, and would be less expensive. Although he testified that he had been with the postal service for forty-two years, practically all of which time was spent in the area covered by the passenger train service in question, Commissioner Peterson persisted in questioning the extent of his familiarity with the locality.

The Commissioner openly attacked this witness' credibility and even intimated that his testimony might have been "bought":

"Commr. Peterson: When were you subpoenaed by the company?

"The Witness: About a week or 10 days ago.

"Commr. Peterson: How much did you receive from the company?

"The Witness: My mileage.

"Commr. Peterson: Is that all you received?

"The Witness: That is all.

"Commr. Peterson: You didn't receive any money?

"The Witness: Just the witness fees.

"Commr. Peterson: How much?

"The Witness: One dollar, I suppose it is.

"Commr. Peterson: Don't you know?

"The Witness: All I got. That is what it is, isn't it?

"Commr. Peterson: You really were subpoenaed then?"

When another witness, the Hibbing postmaster, subpoenaed by the appellant, testified that his witness fees and mileage amounted to $1.12, Commissioner Peterson interrupted to say, "I think Mr. Ahlquist should take notice to that figure there."

In passing upon appellant's contention that it had been deprived of due process of law, the State Supreme Court noted in part the hostility with which appellant had to contend and commented, as follows:

"We have examined the entire record and believe that it can be fairly said that no fairminded court can approve of the conduct of Commissioner Peterson. From the very beginning of the first hearing, he manifested an attitude of hostility toward the railway company. It would be useless to set forth in detail the many in-

stances of misconduct found in the record which should be condemned by any court. A few instances should suffice for the purpose of emphasizing our disapproval.

"The first hearing was commenced at Hibbing with the understanding that it later would be adjourned to Duluth. At one point in the hearing at Hibbing a question arose as to the number of people who rode on passes. The following colloquy then took place:

'Commr. Peterson: There is probably two to every cash fare riding on the train.

'Mr. Stevens: Are you aware of that fact, Mr. Peterson?

'Commr. Peterson: I heard that time and time again from other employees.

'Mr. Stevens: From whom did you hear that?

'Commr. Peterson: Is it necessary to divulge the name of every employee who talks to me about it?

'Mr. Stevens: If you are going to put evidence in the case, I think you should be sworn and proceed according to the rules of evidence.

'Commr. Peterson: If you want to get rough about it, I will really open up down in Duluth about this employee pass situation. I will give you a workout in Duluth.

'Commr. Lund: Let's keep it under control.

'Commr. Peterson: I have got plenty of information on that.' "

The State Supreme Court then referred to Commissioner Peterson's pronouncement made at the opening of the 1953 hearings that an Ex Parte Order would be made summarily to re-establish passenger train service before the 1952 Order became effective—a pronouncement promptly implemented by the May 6, 1953 Order. The Court then commented on other instances of misconduct as follows:

"Many other similar instances are to be found in the record. While the function of the Railroad and

> Warehouse Commission is somewhat different from a court, in that it has powers to investigate as well as to decide matters in issue, we think that it is clear that due process requires such fairness in a hearing that interested parties may have a fair opportunity to submit evidence without undue and unfair interference from those who, in the final analysis, are to judge the merits of the controversy."

That Court then considered the ruling of this Court in *Morgan v. U. S.*, 304 U. S. 1, relating the case at bar to the statements therein relative to lack of proper hearing, and said:

> "If we were dealing with an action tried in a court of this state, we have no doubt that conduct on the part of a trial judge comparable to that of Commissioner Peterson would require a new trial and that upon such new trial the judge guilty of such misconduct should be disqualified from hearing the case again."

The State Supreme Court commented only upon the conduct of Commissioner Peterson and, while the lack of due process is fully demonstrated by his conduct, the actions of Chairman Rasmussen himself were not as impartial as due process requires. For example, Chairman Rasmussen initiated inquiries on legally irrelevant but emotionally exciting matters such as drawing comparisons between appellant's passenger service to the small communities and flag stops located on its lines and crack passenger flyers operating between major cities:

> "Would you say, Mr. Stalker, your train compares favorably with the Gopher, that goes between Minneapolis and Duluth? * * * Well, is there any real reason why, for instance, the people north of Duluth in an area that produces such a tremendous amount of income for the railroad should have inferior service as compared with the service that goes south from Duluth." (Vol. III, p. 1247)

Appellant neither questioned the fact that its revenues from freight traffic were large as compared with its out-of-pocket loss from the operation of the questioned passenger train service (the facts and figures were in the record), nor did it contend that the out-of-pocket loss alone would justify termination of passenger train service. It did contend that such loss was potent evidence of the non-use of that service by the public. Nevertheless, Chairman Rasmussen pursued at great length inquiries as to the financial history of the appellant, and particularly the relation of freight profits to passenger losses, as though they, rather than the question of public necessity and convenience, were the paramount issues in the case. The findings subsequently made by the Commission distorted the contentions of the appellant in this regard by representing that it was appellant's "belief that it is only necessary to show an out-of-pocket loss on a certain portion of the service it renders in order to justify its opposition to the Commission's Order to Show Cause in this matter." (Vol. I, p. 69)

In this framework of prejudice, it is not surprising that on October 6, 1953, the Commission, Chairman Rasmussen and Commissioner Peterson comprising a majority, issued its 1953 order reversing the Commission's 1952 authorization for discontinuance of the passenger service. This 1953 order not only required resumption of the passenger service but also specified wholly new schedules and a reduced running time (Vol. I, pp. 77-8) which one of the intervenors' witnesses (an engineer on appellant's railroad) testified could not be met with the existing equipment. (Vol. III, pp. 1627-8)

"Findings of Fact" accompanied the 1953 order. (Vol. I, pp. 61-77) These so-called findings consisted almost entirely of a recapitulation of testimony unfavorable to appellant —

principally opinion testimony of lay witnesses, many of whom scarcely ever used the passenger trains and one of whom was physically unable to do so. Lacking proof or even testimony on some points, the findings also made frequent reference to matters not susceptible to judicial or administrative notice with such catch phrases as "It is common knowledge," and "Everyone knows."

Typical of the manner in which the findings were geared to the result reached rather than to the fair appraisal of the evidence, was the finding that "All of the following towns are left without any public transportation service: Grand Lake, Burnett, Culver, Alborn, Birch, Payne, Kelsey, Sax, Fens, Zim, Forbes, Iron Junction, Wolf, Macon, Sherwood, and Mitchell." The record showed without contradiction that the populations attributed to these stops and flag stops (characterized by the Commission as "towns") were 25, 100, 36, 50, 28, 107, 50, 10, 25, 100, 25, 107, 0, 0, 0 and 0, respectively and were not concentrated near the railroad. (Vol. IV, p. 4) These scattered populations were situated within reasonable distances of public bus transport which in some instances operated all year round, and in others, where roads were subject to weight limitation during the spring breakup, all but a few weeks of the year. (Vol. IV, pp. 5, 41 and 42)

What the findings omitted is also significant. For instance, on the prime issue before the Commission, public convenience and necessity, the uncontradicted evidence was that passenger patronage had dwindled to an average of 4.62 passengers per passenger train mile on trains manned by crews of five men. (Vol. III, pp. 870 and 876) The Commission essayed no answer to this and the findings accompanying the 1953 Order completely ignored this element of the case.

Commissioner Lund dissented from the 1953 order, saying,

> "No new evidence was presented showing any change in the economic development of the area served by the carrier nor was there any showing that public convenience and necessity requires the restoration of the train service ordered discontinued by this Commission in its order of November 7, 1952." (Vol. I, pp. 78-80)

On appeal to the District Court, appellant argued that it had not received the fair hearing before the Commission which due process requires, contending:

> "The proceedings and order of the Commission deprives defendant of the equal protection of the laws, of its property without just compensation, and without due process of law, in violation of the Constitution of the United States and the State of Minnesota." (Vol. III, p. 1442)

The first question raised by the appellant on its appeal to the State Supreme Court was

> "Was the appellant deprived of due process of law, in that it was not accorded a fair and impartial hearing?"

and appellant's first assignment of error was

> "The District Court erred in that it held that the appellant had been accorded a fair and impartial hearing by the Commission and had not been deprived of due process of law."

The State Supreme Court recognized that due process of law is as much required in making an order involving train service as it is in the promulgation of an order fixing rates. In this connection it cited *Chicago, M. & St. P. R. Co. v. Minn.*, 134 U. S. 418 (1890) and discussed the contention that the hearing before the Commission was so unfair as to deprive appellant of due process of law. The State Supreme Court concluded, as we have pointed out above, that the conduct of Commissioner Peterson "cannot be approved by any

fairminded Court" and "should be condemned by any Court" and that such conduct on the part of a trial judge would require a new trial and disqualification of the judge on rehearing.

The State Supreme Court nevertheless specifically rejected the contention that lack of due process required setting aside the Commission's 1953 order because of a twofold difficulty, which the Court expressed as follows:

> "The difficulty here is twofold. We cannot grant a new trial, nor is there any way in which we can hold that a member of the Railroad and Warehouse Commission is disqualified for bias. It may be too much to expect that administrative officials should conduct themselves with the decorum expected of trial judges, but due process does involve an element of fair play and an opportunity for a fair hearing, and, when conduct of administrative officials becomes so unfair that litigants are deprived of the opportunity to fairly present their evidence or be heard, it becomes the duty of the courts to nullify an order based on such hearing for lack of due process. Were it not for the fact that, after careful consideration of the voluminous record in this case, we have come to the conclusion that other members of the commission did give the railway company an opportunity to submit its evidence, probably under some difficulty, we would be inclined to reverse for lack of due process. On appeal, the trial court also gave the railway company a further opportunity to submit whatever additional evidence it desired to submit. While this case comes perilously close to the point where an administrative hearing cannot be upheld, we reluctantly conclude that it should not be reversed because of the misconduct of one of the members of the commission."

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions herein presented are substantial and novel and merit plenary examination, upon briefs and oral argument. This is apparent from the conclusion of the State Supreme Court just quoted.

Insofar as appellant has been able to ascertain, this Court has never considered whether due process of law is denied when the decisive vote in an administrative determination is cast by an officer who is hostile and guilty of misconduct, as here concluded by the State Supreme Court. Absent the vote of Commissioner Peterson, the order to reestablish passenger train service could not have issued, because the Commission was otherwise evenly divided.

Appellant has been unable to find a decision by this Court involving even the broader question of whether bias, misconduct, hostility and prejudgment in a state administrative agency deny, in and of themselves and without regard to the influence those factors have upon the ultimate determination reached, that due process of law required by the Fourteenth Amendment to the Constitution of the United States. Thus, when bias, hostility and misconduct have been found to exist in an administrative agency, is any inquiry as to the reasonableness of the order legally relevant to the question of whether due process has been denied. Appellant thinks not.

A clear statement of the principle for which appellant contends is found in the opinion of Judge Goodrich in *Berkshire Employees Ass'n. v. N.L.R.B.*, 121 F. 2d 235 (3rd Cir. 1941), which involved circumstances closely akin to those here in that an administrative officer who shared the responsibility for deciding the issues was charged with bias:

"* * * If the circumstances alleged are proved Berkshire did not have a hearing before an impartial tribunal, but one in which one member of the body which made exceedingly important findings of fact had already thrown his weight on the other side. This is obviously not like a case where ill-advised extra-judicial statements have been made by a judge, or where a litigant seeks to subject an administrative body to interrogatories to discover the inner workings of the administrator's mind. It goes further and, in our judgment, it goes beyond that which is permissible from the standpoint of either litigants or public.

"The Board argues that at worst the evidence only shows that one member of the body making the adjudication was not in a position to judge impartially. We deem this answer insufficient. Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured." (at p. 239)

A fortiori, the principle of the *Berkshire* case, *supra,* should control the case at bar, where the vote of a Commissioner found by the State Supreme Court to be hostile was essential to the Commission's action.

A number of Federal cases, though arising in the somewhat different context of misconduct by National Labor Relations Board trial examiners, indicate that bias even on the part of administrative officers who do not participate in the final determination will vitiate, on due process grounds, proceedings conducted by them. See *Montgomery Ward v. N.L.R.B.,* 103 F. 2d 147 (8th Cir. 1939); *Inland Steel Co. v. N.L.R.B.,* 109 F. 2d 9 (7th Cir. 1940); *N.L.R.B. v. Washington Food Co.,* 118 F. 2d 980 (9th Cir. 1941); *N.L.R.B. v. Phelps,* 136 F. 2d 562 (5th Cir. 1943).

Several Federal court cases, also involving hearing rather than deciding officers, contain language which might be said to support the proposition that bias does not vitiate an administrative decision which is supported by substantial evidence. See *N.L.R.B. v. Ford Motor Co.*, 114 F. 2d 905, cert. den. 312 U. S. 689 (6th Cir. 1940) (distinguishing the *Inland* and *Montgomery Ward* cases, *supra*, as instances of more obviously prejudicial impropriety); *N.L.R.B. v. Air Associates*, 121 F. 2d 586 (2d Cir. 1941); *N.L.R.B. v. Western Cartridge Co.*, 138 F. 2d 551 cert. den. 321 U. S. 786 (2d Cir. 1943). If so, they show a conflict of view between the Courts of Appeal of different circuits calling for resolution by this Court. But because these cases involved lesser degrees of bias, they may not conflict with those first cited above.

Not apposite here are those cases* asserting the "rule of necessity" (that administrative determinations should be sustained when no other body has authority to hear the matter), because Commissioner Clifford C. Peterson, the Commissioner whom the State Supreme Court castigated, is not now and was not a member of the Commission at the time of either decision in the Minnesota Courts. A quashing of the Commission's 1953 order would not, therefore, have resulted in a new hearing before the hostile Commissioner, even on the State Supreme Court's view of the case. Quashing the Commission's 1953 order will require no further proceeding in this action by either the Courts or the Commission, for appellant is now and will in the future be continuously subject to the full regulatory power of the Commission, lawfully exercised, in any proper procedure designed to de-

*See *U. S. v. Morgan*, 313 U. S. 409 (1941); *Marquette Cement Co. v. F. T. C.*, 147 F. 2d 589 (7th Cir. 1945); *Montana Power Co. v. Public Service Commission*, 12 F. Supp. 946 (D. Mont., 1935); *Brinkley v. Hassig*, 83 F. 2d 351 (10th Cir. 1936).

termine whether the public convenience and necessity does now or will in the future require passenger train service in the area.

Appellant contends that the error into which the State Supreme Court fell was twofold:

First, the Court failed to recognize that if the procedure before the Commission did not accord with due process it matters not whether the result was or was not supported by evidence. See *Tumey v. Ohio*, 273 U. S. 510, 535 (1927); *Berkshire Employees Ass'n. v. N.L.R.B.*, 121 F. 2d 235 (3rd Cir. 1941).

Second, assuming that bias, as found by the State Supreme Court, existed on the part of Commissioner Peterson alone, the legal result is that the Court confirmed a Commission order which reversed the status quo and which at best, on that Court's theory, was arrived at by one unbiased Commissioner, with one other unbiased Commissioner dissenting. This appellant submits is an arbitrary and unreasonable result not consistent with due process.

If this case be not within this Court's jurisdiction on appeal, as appellant is convinced that it is, the foregoing discussion of the substantiality of the questions herein presented suggests, with equal reason and vigor, the propriety of this Court's review of the case in the exercise of its sound judicial discretion on a petition for a writ of certiorari. If appellant be in error as to its right of direct appeal, appellant requests that this Statement be treated as on a petition for a writ of certiorari, pursuant to Title 28, U. S. Code, Sec. 2103.

CONCLUSION

Appellant submits that it has demonstrated that Federal questions of substance not heretofore determined by this Court were decided by the State Supreme Court. The Court is urged to make it clear that a State administrative tribunal cannot hear a proceeding in an aura of bias, hostility, prejudgment and misconduct "which should be condemned by any court" and expect an order issued as a result of such procedure to be affirmed by the Courts. The issue can never be presented more clearly than in the instant proceeding.

The Court should note probable jurisdiction in this case.

Dated June 13, 1956.

Respectfully submitted,

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APPENDIX "A"

STATE OF MINNESOTA
SUPREME COURT

No. 164—St. Louis County—Knutson, J.

State of Minnesota,

Respondent,

vs.

36621 Duluth, Missabe and Iron Range Railway Company,

Appellant,

and

Order of Railway Conductors, et al, Intervenors,

Respondents.

Endorsed
Filed February 24, 1956
Frank Larkin, Clerk
Minnesota Supreme Court

SYLLABUS

1. On appeal to the district court from an order of the Railroad and Warehouse Commission, the function of the district court is to judicially determine whether the order is reasonable and lawful. In the determination of these questions the court must consider all the evidence before it in the same manner as an appellate court considers the findings of a jury.

2. On appeal from an order of the district court reviewing an order of the Railroad and Warehouse Commission, the function of this court is to determine whether all the evidence, inclusive of the evidence submitted to the trial court, sustains the findings of the district court that the order was reasonable and lawful.

3. The burden rests on appellant to overcome the prima facie effect that must be given an order of the Railroad and

Warehouse Commission. The evidence to overcome such order must be clear and convincing.

4. The evidence in this case sufficiently supports the order of the commission, tested by the rules applicable to appeals from such orders.

5. Due process in an administrative proceeding must include a hearing attended by at least the rudiments of fair play. This involves a hearing in which interested parties are not deprived of a fair opportunity to present evidence and be heard.

6. The right to a fair hearing embraces the right to know the claims of opposing parties and what issues are to be investigated or litigated.

Affirmed.

OPINION

KNUTSON, JUSTICE.

This is an appeal from a judgment affirming an order of the Railroad and Warehouse Commission requiring the reestablishment of railroad passenger service on defendant's lines hereinafter described.

For the sake of brevity, we shall include only those facts deemed essential to an understanding of the issues to be determined.

Defendant Duluth, Missabe and Iron Range Railway Company, referred to hereinafter as the railway company, is a railway corporation, organized under the laws of Minnesota, engaged in operating as a common carrier of passengers and freight. It operates principally between the city of Duluth and the villages and towns on the Iron Range in this state. Several years ago it operated several passenger trains between the cities and villages connected by its tracks, but most of these were abandoned long ago. At the time of the

commencement of these proceedings it operated a passenger train, designated as No. 1, which left Duluth at 8:20 a.m. and arrived at Hibbing at 11:38 a.m. With this service, it furnished bus service between some of the smaller towns. Its train No. 2, going in the opposite direction, left Hibbing at 1:15 p.m. and arrived at Duluth at 4:10 p.m. Train No. 11 connected with train No. 1 at Iron Junction and ran from that point to Virginia. It left Iron Junction at 10:46 a.m. and arrived at Virginia at 11:22 a.m. Train No. 12 left Virginia at 9:45 a.m. and arrived at Iron Junction at 10:20, connecting with train No. 1 at that point; and train No. 14 left Virginia at 1:10 p.m. and arrived at Iron Junction at 1:56 p.m. so as to connect with train No. 2. Trains Nos. 1 and 2 stopped at the following intermediate stations between Duluth and Virginia-Hibbing-Buhl: Missabe Junction (Duluth), 57th Avenue West (Duluth), Proctor, Adolph, Saginaw, Grand Lake, Burnett, Culver, Alborn, Payne, Kelsey, Zim, Forbes, Iron Junction, Wolf, Wilpen, Mitchell, Shenango, and Chisholm and would stop on flag at Munger, Birch, Sax, Fens, Macon, and Sherwood. Trains Nos. 11, 12, and 14, between Virginia and Iron Junction, stopped at the intermediate stations of Eveleth and Largo and by flag at Spruce and Rainy Junction.

The distance from Duluth to Hibbing is 84 miles; from Duluth to Buhl 90 miles; and from Duluth to Virginia 78 miles.

The Schedule of trains Nos. 1 and 2 was so arranged as to connect with trains coming into Duluth in the morning from Chicago, the Twin Cities, and other points to the east, south, and west and, similarly, in the evening with trains leaving Duluth for other points. All the trains carried mail and express.

The total population served by these trains is somewhat in excess of 150,000, of which approximately 107,000 live in the Duluth-Proctor area; 42,000 in the five major Range villages; and slightly in excess of 1,000 in the vicinity of the other intermediate stations named above.

Each train was manned by a full crew of five members.

Daily air service is available between Duluth, Hibbing, and Chisholm, and, except Sunday, other daily passenger train service is available between Duluth and Virginia. No passenger service, aside from that involved here, is available between Duluth and Hibbing or other towns served on that part of the line.

The railway company's track and track bed are among the best to be found anywhere. Its principal business is that of transporting iron ore from the Iron Range to the docks in Duluth and Superior. Its freight equipment has been improved and modernized so as to raise its efficiency to the highest possible level. Its passenger service, on the other hand, is rendered by an old-type steam locomotive. Its cars, while probably adequate for the limited use made of them, have not been modernized. Its time of operation has not been improved for many years.

At the time of trial, the net investment of the railway company after deducting depreciation and amortization, plus materials, supplies, and cash, was $101,753,864. The net operating income of the entire system for 1952 was $5,638,186 and for 1953 it was $10,405,444. In the operation of the passenger service here involved it suffered an "out-of-pocket" loss in 1951 of $195,753.03 and for 1952 of $223,127.36. The railway company contends that there are other expenses common to both freight and passenger service, part of which properly is assignable to passenger service, which are not in-

cluded in the above figures and that, if they had been included, the loss would have been even greater.

Over the years the number of passengers carried on the trains involved has decreased substantially. For the year 1952 the average number of passengers carried per train mile was 4.62 or slightly less than the five-man crew. The total number of passengers carried and revenue derived from them for the years covered by the evidence are as follows:

Year	Passengers Carried	Revenue Received
1950	12,066	$8,151.87
1951	12,438	7,334.20
1952	13,854	7,806.98
3 months of 1953	2,431	1,403.05

In addition to the above, revenue was derived from mail and express transportation so that the total revenue for 1952 amounted to $75,193.15.

The larger villages involved in the service are served by a number of buses running each way each day and also by some air service. Some of the smaller towns are located from a short distance up to four or five miles from highways on which buses run. The number of people so situated that bus service would not be directly available would probably be slightly more than 1,000. Some of the roads on which buses run or might run are affected by climatic conditions so that in the spring of the year it is not possible for buses to run on them. Since the abandonment of rail passenger service, star routes have been established to carry mail to the Range towns and from those towns to Duluth, and it is somewhat doubtful from the evidence in this case whether contracts for the carrying of mail could be recaptured.

On March 5, 1952, the railway company filed its application with the Railroad and Warehouse Commission for au-

thority to discontinue the above passenger service. Public hearings were held at Hibbing and Duluth. The Railroad and Warehouse Commission then consisted of Commissioners Ewald W. Lund, Elling A. Knutson, and Clifford C. Peterson.[1] On November 7, 1952, after quite a lengthy hearing, the commission made its order authorizing discontinuance of the service. Commissioner Peterson dissented.

Thereafter an application was filed by the Range Municipalities and Civic Association for a rehearing. In the meantime the personnel of the commission had changed by the election, at the November 1952 general election, of Paul A. Rasmussen in the place of Commissioner Knutson. The commission set the application for hearing on December 11, 1952. The commission failed to act on the application, and, no appeal having been taken, the order of November 7 became final as provided by M. S. A. 216.25. Pursuant thereto, passenger service was discontinued on May 15, 1953, and, under stays granted by the district court, no service has been rendered since that time.

On April 15, 1953, the commission, on its own initiative, issued an order to show cause why the service abandoned under the order of November 7, 1952, should not be reestablished. Hearing thereon was set for May 1, 1953, at Hibbing, and the commission, with Commissioner Lund dissenting, issued an ex parte order on May 6 requiring the reestablishment of the service abandoned. No change in schedule from the former service was provided in that order. The enforcement of the order was enjoined by the district court on the ground that the commission lacked authority to make it. The hearing on the order to show cause proceeded to comple-

[1]Commissioner Clifford C. Peterson was replaced by Hjalmer Petersen in the 1954 general election. Reference to Commissioner Peterson herein has nothing to do with Hjalmer Petersen.

tion on May 21. On October 6, 1953, the commission issued its order, Lund again dissenting, which, as far as material here, reads as follows:

> "That the Duluth, Missabe and Iron Range Railway Company be and it is hereby ordered to re-establish passenger train service afforded to the public prior to May 15, 1953, by the restoration of the operation of Passenger Trains Nos. 1, 2, 11, 12, 14 and bus service contributory to Train Nos. 1 and 2 between Wilpen and Buhl, Minnesota.
>
> "It is Further Ordered that the Respondent place in effect the following time schedule:
>
> "That one passenger train leave Hibbing, Minnesota not later than 7:30 a.m.
>
> "That one passenger train leave Duluth not earlier than 5:30 p.m.
>
> "It is Further Ordered that the time schedule of Passenger Trains Nos. 11, 12 and 14 and bus service contributory to Nos. 1 and 2 between Wilpen and Buhl, Minnesota, be co-ordinated with the schedule of Trains Nos. 1 and 2.
>
> "It Is Further Ordered that the Respondent reduce the running time of said trains so that the total time consumed in the operation of said trains between Duluth and Hibbing be not more than two hours and fifteen minutes.
>
> "It is Further Ordered that said passenger train service be re-established not later than November 1, 1953."

An appeal was taken from this order to the district court, where additional evidence was received, after which the district court affirmed the order of the commission. This appeal followed.

While the railway company lists a number of assignments of error, the appeal involves essentially the questions of whether or not the order of the Railroad and Warehouse

Commission is lawful and reasonable as those terms are legally defined in our statutory and case law.

1. The statute under which this appeal is taken, as construed by the court, governs the scope of this appeal. A brief history of the development of this statute may be of some help in determining the scope of our appeal. The original statute creating the Railroad and Warehouse Commission (L. 1887, c. 10) provided a very limited right of appeal. With respect to the establishment of rates, for instance, we held in State ex rel. R. & W. Comm. v. Chicago, M. & St. P. Ry. Co. 38 Minn. 281, 37 N. W. 782, that the rates fixed by the Railroad and Warehouse Commission were conclusive on the question of reasonableness. That case was removed to the United States Supreme Court on a writ of error. Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 S. Ct. 462, 33 L. ed. 970. That court reversed our decision, holding that the question of reasonableness was a judicial question. The following language of the court is of interest here (134 U. S. 458, 10 S. Ct. 467, 33 L. ed. 981):

> "* * * The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

What the court said about rates is equally true of the requirement that a railway company continue to operate a train under the circumstances involved here.

Thereafter our statute was amended by L. 1891, c. 106. Under § 3 of that act the right of appeal was considerably extended. The authority of the court on appeal is contained in the following language:

> "* * * Upon such appeal, and upon the hearing of any application by the commission or by the attorney general, for the enforcement of any such order made by the commission, the district court shall have jurisdiction to, and it shall, examine the whole matter in controversy, including matters of fact as well as questions of law, and to *affirm, modify or reverse* such order in whole or in part, as justice may require; and in case of any order being modified, as aforesaid, such modified order shall, for all the purposes contemplated by this act, stand in place of the original order so modified and have the same force and effect throughout the state as the orders of said commission." (Italics supplied.)

We considered that provision in Steenerson v. G. N. Ry. Co. 69 Minn. 353, 375, 72 N. W. 713, 716, where we said after quoting the above provision:

> "If by this the legislature intended to provide that the court should put itself in the place of the commission, try the matter de novo, and determine what are reasonable rates, without regard to the findings of the commission, such intent cannot be carried out, as a statute which so provided would be unconstitutional. The fixing of rates is a legislative or administrative act, not a judicial one.* * *
>
> "* * * Under the constitution, the district court may, on appeal to it, review the findings of the commission in the same manner as an appellate court reviews the findings of the jury on a trial in the court below. And for

this purpose the court may 'examine the whole matter in controversy, including matters of fact, as well as questions of law.'

"In other words, the court may examine matters of fact to *ascertain whether there is any evidence reasonably tending to support the findings of fact disputed,* and may examine questions of law arising on the facts conceded. It seems to us that this is, then, the proper interpretation of this somewhat vague and obscure statute, and the only interpretation which will render it constitutional. While the district court takes the evidence de novo, it cannot put itself in the place of the commission, and try the facts in controversy de novo." (Italics supplied.)

This provision again was amended by L. 1895, c. 107. That amendment is not of consequence here. In R. L. 1905, § 1972, the language is even broader. It provides:

"* * * The court shall try the case de novo, and render such order therein as may be just and proper, which shall stand in place of the original order."

The language of our present statute (M. S. A. 216.25) was adopted by L. 1907, c. 167. With respect to the function of the court on appeal, it reads:

"* * * Such findings of fact [of the commission] shall be prima facie evidence of the matters therein stated, and the order shall be prima facie reasonable, and the burden of proof upon all issues raised by the appeal shall be on the appellant. If the court shall determine that the order appealed from is lawful and reasonable, it shall be affirmed and the order enforced as provided by law. If it shall be determined that the order is unlawful or unreasonable, it shall be vacated and set aside."

Under this statute it would seem that the function of the court is twofold: (1) To determine if the order is reasonable; and (2) to determine if the order is lawful. If the negative of either is found, the order must be set aside. The determina-

tion of each involves separate consideration, although in many instances the elements of one overlap a determination of the other. In essence, determination of lawfulness involves mainly questions of jurisdiction, procedure, and due process. Determination of reasonableness may involve a multitude of factors, depending on the nature of each case. For instance, it involves such things as a comparative expense and possible loss to the company balanced against the convenience and necessity to the public; possibility of confiscation of property; use or lack of use of the facility by the public; availability of competing services; and many other factors depending on the facts of each case. The question which frequently is troublesome is: How far can a court go in setting aside the order of the commission on the ground of unreasonableness? The formulation of rules governing the determination of this question often has been perplexing to the court, but we believe that the applicable law now has been settled in this state as far as it can be settled.

In State v. G. N. Ry. Co. 130 Minn. 57, 59, 153 N. W. 247, 248, Ann. Cas. 1917B, 1201, 1202, the applicable law, followed in many restatements of the law,[2] was stated as follows:

> "The principles on which the court acts in determining whether or not an order of the commission is reasonable, have been the subject of much controversy, but the law on that subject is now pretty well settled. The leg-

[2]State and R. & W. Comm. v. Minneapolis & St. L. R. Co. 209 Minn. 564, 297 N. W. 189; Arrowhead Bus Service, Inc. v. Black & White D. C. Co. Inc. 226 Minn. 327, 32 N. W. (2d) 590; Twin City Motor Bus Co. v. Rechtzigel, 229 Minn. 196, 38 N. W. (2d) 825; State and Port Authority of St. Paul v. N. P. Ry. Co. 229 Minn. 312, 39 N. W. (2d) 752; N. P. Ry. Co. v. Village of Rush City, 230 Minn. 144, 40 N. W. (2d) 886; see, In re Chicago, M. St. P. & P. R. Co. (D. Minn.) 50 F. (2d) 430; Rock Island Motor Transit Co. v. Murphy Motor Freight Lines (D. Minn.) 101 F. Supp. 978.

islature never intended that the court should put itself in the place of the commission, try the matter anew as an administrative body, substituting its findings for those of the commission. A statute which so provided would be unconstitutional as a delegation to the judiciary of nonjudicial powers. * * * The making of regulations which require a carrier to afford proper transportation facilities to the public, is legislative or administrative and not judicial in its nature. * * * The courts must not usurp legislative or administrative functions by setting aside a legislative or administrative order on their own conception of its wisdom. * * * In Steenerson v. Great Northern Ry. Co. 69 Minn. 353, 375, 72 N. W. 713, 716, a rate case, this court, in construing the statute then in force, which was broader than the one now in force, held that it was the intention of the legislature that the court on appeal should 'review the findings of the commission in the same manner as the appellate court reviews the findings of the jury on a trial in the court below. And for this purpose the court may "examine the whole matter in controversy, including matters of fact, as well as questions of law," ' but that the district court can review the findings of the commission only so far as to determine whether or not the rates fixed by the commission are reasonable. This presents a situation somewhat anomalous in that the court may receive evidence in order to determine whether findings of fact are sustainable, but we can conceive of no other fair construction of this statute that will at the same time confine the court within its constitutional powers. The court, on appeal from the order of the commission, must distinguish, then, between the legislative power to establish regulations and the judicial power to determine upon the reasonableness of regulations already established.

"* * * The order may be vacated as unreasonable if it is contrary to some provision of the Federal or state constitution or laws, or if it is beyond the power granted to

the commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interest of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment."

We have held in a number of cases that the rule of review by the district court is the same as that of an appellate court in reviewing the findings of a jury.[3] There is, however, an obvious difference in procedure, in that, on reviewing the order of the commission, the trial court may receive new evidence not submitted to the commission, while a review in this court of the findings of a jury is limited to the record made in the trial court. As was said by Mr. Justice Hallam in State v. G. N. Ry. Co. *supra*, it does seem somewhat anomalous to hold that the order of the commission is prima facie reasonable and lawful and that, on appeal, new evidence may be received to overcome the prima facie standing of the order and that, at the same time, the trial court cannot hear the case de novo. However, it is now clear that such evidence is admitted for the limited purpose of testing the reasonableness and the lawful nature of the order.

2. The respective functions of the district court on appeal from an order of the commission and of this court on appeal from the decision of the district court are stated in Twin City Motor Bus Co. v. Rechtzigel, 229 Minn. 196, 207, 38 N. W. (2d) 825, 831, as follows:

"Respondent asserts that in the absence of a new trial this court can only consider whether the evidence supports the findings below. Respondent urges that the findings must be sustained if there is any evidence to support them. This expresses the rule on an ordinary appeal in

[3]State v. G. N. Ry. Co. 130 Minn. 57, 153 N. W. 247, Ann. Cas. 1917B, 1201; State and Port Authority of St. Paul v. N. P. Ry. Co. 229 Minn. 312, 39 N. W. (2d) 752.

a civil action tried in the district court. However, in view of the statutes governing appeals from the commission, a different rule prevails in cases of this type. The rule, as set forth in the above statute governing appeals, is that the district court's function is to determine whether the commission's order is reasonable and lawful, or whether it exceeded its jurisdiction in the light of the evidence before the commission and subsequent evidence bearing thereon received in district court.

"The rule on appeal here, therefore, is not whether the evidence reasonably sustains the district court's findings, but rather whether all of the evidence presented, including the evidence submitted to the commission and the district court as well, reasonably sustains the district court's finding that the commission's order was unlawful and unreasonable."

In State and Port Authority of St. Paul v. N. P. Ry. Co. 229 Minn. 312, 321, 39 N. W. (2d) 752, 758, we said with respect to the function of this court on such appeal:

"* * * an appeal therein from a judgment of the district court, vacating such order of the commission as unlawful, unreasonable, and confiscatory, presents to the supreme court the sole issue of whether all the evidence, inclusive of the evidence submitted to the district court as well as that presented to the commission, sustains the district court's finding that the order of the commission is unlawful and unreasonable. As to findings of fact, the supreme court merely determines whether the district court, in the light of all the evidence before it and before the commission, applied to the findings and order of the commission the same rule of review which governs an appellate court in reviewing the findings of a jury."

3. It must be kept in mind also that under our statute the burden rests on the railway company to overcome the prima facie reasonableness of the commission's order. We have held that the evidence must be clear and convincing before

such order may be set aside by the court.[4] We believe that this is in accord with the great weight of authority.[5]

4. Tested by these rules, it cannot be said that the evidence in this case does not sustain the findings of the commission and the trial court. The passenger service involved in this case serves a territory peculiar in itself. It consists of an area in which many people live in small towns between the larger center of Duluth and the larger villages of Hibbing, Chisholm, and Virginia. Some of the people in these smaller towns will be left without other means of transportation if the railway company's train is discontinued. While the loss to the carrier seems out of all proportion to the use made of the service, when the overall operation of the carrier is taken into consideration we cannot say that the commission went beyond its authority in ordering the reestablishment of the passenger service. Aside from the question of proper notice, which is discussed elsewhere herein, the commission does have authority to require a change in schedule of operation of the carrier's train. Schain v. G. N. Ry. Co. 137 Minn. 157, 162 N. W. 1079.

The fact that the overall operation of the carrier produces a profit does not of itself justify an order requiring maintenance of passenger service, nor does the fact that the carrier sustains a loss from the operation of the passenger service, of itself, require its abandonment. Schain v. G. N. Ry. Co. *supra*. Neither are conclusive, but both must be given consideration in determining whether public convenience and necessity require the continuance of the service.[6] Both the

[4]See, State v. Tri-State T. & T. Co. 204 Minn. 516, 284 N. W. 294; State and Port Authority of St. Paul v. N. P. Ry. Co. 229 Minn. 312, 39 N. W. (2d) 752.

[5]See, 9 Am. Jur., Carriers, § 90.

[6]State v. G. N. Ry. Co. 130 Minn. 57, 153 N. W. 247, Ann. Cas. 1917B, 1201.

rights of the public and the rights of the carrier must be given consideration, and, in a large measure, the determination of the reasonablenss or unreasonableness of continuing such service under the facts in each case must be left with the commission, subject to the right of review under the rules we have stated above.

5. The railway company contends that the order should be set aside because the hearing was so unfair that it deprived the railway company of due process of law. This contention is based mainly on the unfair conduct and interference of one of the commissioners, Clifford C. Peterson. We have examined the entire record and believe that it can be fairly said that no fairminded court can approve of the conduct of Commissioner Peterson. From the very beginning of the first hearing, he manifested an attitude of hostility toward the railway company. It would be useless to set forth in detail the many instances of misconduct found in the record which should be condemned by any court. A few instances should suffice for the purpose of emphasizing our disapproval.

The first hearing was commenced at Hibbing with the understanding that it later would be adjourned to Duluth. At one point in the hearing at Hibbing a question arose as to the number of people who rode on passes. The following colloquy then took place:

> "Commr. Peterson: There is probably two to every cash fare riding on the train.
>
> "Mr. Stevens: Are you aware of that fact, Mr. Peterson?
>
> "Commr. Peterson: I heard that time and time again from other employees.
>
> "Mr. Stevens: From whom did you hear that?
>
> "Commr. Peterson: Is it necessary to divulge the name of every employee who talks to me about it?

"Mr. Stevens: If you are going to put evidence in in the case, I think you should be sworn and proceed according to the rules of evidence.

"Commr. Peterson: If you want to get rough about it, I will really open up down in Duluth about this employee pass situation. I will give you a workout in Duluth.

"Commr. Lund: Let's keep it under control.

"Commr. Peterson: I have got plenty of information on that."

At the commencement of the second hearing in this matter, counsel for the railway company made a number of motions for dismissal based on what he thought were legal objections to the proceedings. When he was part way through, Commissioner Peterson interrupted to say:

"Commissioner Peterson: Mr. Chairman, if Mr. Stevens doesn't want to cut out this dilly-dallying around and continue, here, I move that the people, here, or Mr. Cina, take over and we will hear the railroad company at a little later date. I also would like to say, at this time, that our next regular business meeting, which will no doubt be Monday, Mr. Stevens, the Commission will issue an ex parte order that will move to continue these trains on for an indefinite time until the Commission has heard this complete hearing of this new proceeding.

"So I move at this time, Mr. Chairman, that if they don't want to move on this hearing that Mr. Cina take over.

"Mr. Stevens: Well, may I rise to a point of information. Do I understand that the Commission has already made up its mind in this matter?

"Commr. Peterson: We have not made up our mind. I say we will issue an ex parte order that will make this train proceed for whatever time we have deemed necessary."

Many other similar instances are to be found in the record. While the function of the Railroad and Warehouse Commission is somewhat different from a court, in that it has powers to investigate as well as to decide matters in issue, we think that it is clear that due process requires such fairness in a hearing that interested parties may have a fair opportunity to submit evidence without undue and unfair interference from those who, in the final analysis, are to judge the merits of the controversy.

In Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773, 82 L. ed. 1129, the United States Supreme Court had before it a case involving the validity of an order of the Secretary of Agriculture. On appeal, the case presented two questions, namely, whether the order was based on the type of hearing required by statute, and, second, whether the order was arbitrary and unsupported by substantial evidence. In holding the order invalid for lack of proper hearing, the court, speaking through Mr. Chief Justice Hughes, said (304 U. S. 14, 58 S. Ct. 775, 82 L. ed. 1130):

> "The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' — essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and

soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.' "

In State v. Tri-State T. & T. Co. 204 Minn. 516, 521, 284 N. W. 294, 300, we said:

"* * * Due process demands that rates be fixed only after a hearing attended by at least the rudiments of fair play."

The *rudimentary requirements* of fair play must be held to include fair treatment at the hands of the administrative officials as well as other elements of fair play.

If we were dealing with an action tried in a court of this state, we have no doubt that conduct on the part of a trial judge comparable to that of Commissioner Peterson would require a new trial and that upon such new trial the judge guilty of such misconduct should be disqualified from hearing the case again. The difficulty here is twofold. We cannot grant a new trial, nor is there any way in which we can hold a member of the Railroad and Warehouse Commission is disqualified for bias. It may be too much to expect that administrative officials should conduct themselves with the decorum expected of trial judges, but due process does involve an element of fair play and an opportunity for a fair hearing, and, when conduct of administrative officials becomes so unfair that litigants are deprived of the opportunity to fairly present their evidence or be heard, it becomes the duty of the courts to nullify an order based on such hearing for lack of due process. Were it not for the fact that, after careful consideration of the voluminous record in this case, we have come to the conclusion that other members of the commission did give the railway company an opportunity to submit its evidence, probably under some difficulty, we would be inclined to reverse for lack of due process. On appeal, the

trial court also gave the railway company a further opportunity to submit whatever additional evidence it desired to submit. While this case comes perilously close to the point where an administrative hearing cannot be upheld, we reluctantly conclude that it should not be reversed because of the misconduct of one of the members of the commission.

6. The next contention of the railway company is that the order to show cause involved only a hearing for a determination of whether the same trains abandoned under the first order should be reestablished and that the railway company had no notice that the commission contemplated making an order requiring establishment of service on a reverse schedule. With this contention we have much difficulty. In Morgan v. United States, 304 U. S. 1, 18, 58 S. Ct. 773, 776, 82 L. ed. 1129, 1132, the United States Supreme Court said:

> "* * * The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

We think that it is elementary that due process does embrace notice of the claims to be investigated or litigated and an opportunity to present evidence on the issues to be determined. Did the railway company have such opportunity here?

The order to show cause is entitled:

> "In the Matter of the Investigation of the Reestablishment of Service by the Duluth, Missabe and Iron Range Railway Company of its Passenger Trains Nos. 1, 2, 11,

12 and 14 and Bus Service Contributory to Trains Nos. 1 and 2 between Wilpen and Buhl, Minnesota."

The order to show cause itself provides:

"That the Duluth, Missabe and Iron Range Railway Company show cause why it should not be required to *reestablish* the passenger train service hereinabove referred to until such further or different order of the Commission is issued in the premises; * * *." (Italics supplied.)

All further papers in the proceeding bore the same title as the order to show cause. The final order did not require the railway company to reestablish the abandoned service but, on the contrary, required establishment of a different type of service. We have no doubt that the commission has power under our statute to order the establishment of service on a different schedule than that which formerly existed. The question here is more vital than that. It involves the fundamental issue of whether the railway company was advised of the commission's intention to investigate establishment of a different type of service and whether the railway company has had an opportunity to be heard on that issue.

While the bulk of the record consists of evidence pertaining to the loss incident to the operation of the abandoned trains, the passengers using the trains on the old schedule, and the lack of necessity for such service, there is much evidence relating to the possible results of service on a reverse schedule, both on direct and cross-examination of witnesses, and particularly in the later hearing. Taking the record as a whole, we think that the evidence sustains the court's finding that the railway company must have known that the commission was considering the establishment of service on such reverse schedule. Practically all the witnesses called in support of the reestablishment of the train service testified that

they were of the opinion that the train would be used by many more people if the schedule was reversed. It would be difficult, if not impossible, to present concrete evidence of such use until the train has been in service for a reasonable period of time. The trial court was of the opinion that the commission was within its jurisdiction if it considered the reestablishment of service desirable, "at least on an experimental basis," for a reasonable period of time. We are inclined to agree. If, after a reasonable trial period during which the railway company genuinely tries in good faith to render service contemplated by the order, the public does not show interest in such service, it is reasonable to assume that the commission may look more favorably upon a new petition to abandon the service.

The railway company claims that it is impossible to comply with the commission's order with respect to the time allotted for running the train on the schedule ordered. We assume that it may be necessary to provide more modern equipment than that heretofore used. However, the order of the commission is prima facie reasonable on appeal. The evidence to show impossibility of performance is not convincing. If it develops, after a fair trial period, that it in fact is impossible to comply with the order, we have no doubt that, on a proper showing, relief may be procured from the commission. At least the showing made here is insufficient to invalidate the order on that ground.

The trial court failed to specifically make any finding that the order of the commission was reasonable and lawful. We believe that such finding is implicit in the court's affirmance.

We have examined all other questions raised by the railway company. They require no further discussion than is contained above.

Affirmed.

APPENDIX "B"

STATE OF MINNESOTA
SUPREME COURT

State of Minnesota,

Respondent,

vs.

36621 Duluth, Missabe and Iron Range Railway Company,

Appellant,

and

Order of Railway Conductors, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Locomotive Engineers, Brotherhood of Railroad Trainmen, the Range Municipalities and Civic Association, Brotherhood of Railroad and Steamship Clerks and the Joint Legislative Board, Intervenors,

Respondents.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of St. Louis be and the same hereby is in all things affirmed.

And it is further determined and adjudged that plaintiff-respondent herein, do have and recover of appellant herein the sum and amount of Seven Hundred One and 50/100 Dollars, ($701.50); and that intervenors-respondents herein, do have and recover of appellant herein the sum and amount of One Hundred Thirty-Five and no/100 Dollars, ($135.00) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed March 20, 1956.

BY THE COURT

Attest:

FRANK LARKIN, Clerk

STATEMENT FOR JUDGMENT

Statutory Costs, $50.00; Printer, $786.50, total, $836.50.

Satisfaction of Judgment filed.

Therefore the above judgment is duly satisfied in full and discharged of record.

Attest:

Clerk

By Deputy

APPENDIX "C"

State of Minnesota — District Court
County of St. Louis — 11th Judicial District

State of Minnesota,

Complainant,

vs.

Duluth, Missabe and Iron Range Railway Company,

Defendant-Appellant,

and

Order of Railway Conductors, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Locomotive Engineers, Brotherhood of Railroad Trainmen, and the Range Municipalities and Civic Association,

Intervenors.

JUDGMENT

February 21, 1955

This cause, being an appeal from an Order of the Railroad and Warehouse Commission dated October 6, 1953, having been set by Order of the Court for trial on a day certain, came on for trial before the Court without a jury on the 1st day of February, 1954, and the Court having heard the evidence and arguments of counsel and being fully advised in the premises, did on the 11th day of January, 1955, duly make and on the 12th day of January, 1955, file its Findings of Fact, Conclusions of Law, and the Order for Judgment herein.

Now, therefore, pursuant to said Order, it is hereby adjudged that the Order appealed from is affirmed.

By the Court:
FRED ASH
Clerk of District Court
By B. G. Rilling
Deputy Clerk

APPENDIX "D"

State of Minnesota
County of St. Louis

District Court
11th Judicial District

State of Minnesota,

Complainant,

vs.

Duluth, Missabe and Iron Range Railway Company,

Defendant-Appellant,

and

Order of Railway Conductors, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Locomotive Engineers, Brotherhood of Railroad Trainmen, and the Range Municipalities and Civic Association,

Intervenors.

FINDINGS, CONCLUSION OF LAW, AND ORDER FOR JUDGMENT

This matter came before the Court on an appeal from the Railroad and Warehouse Commission. It was heard by the undersigned on February 1st and 2nd, 1954, in the Court House in St. Louis County, Minnesota. The plaintiff-respondent was represented by J. A. A. Burnquist, Attorney General of the State of Minnesota, and Victor J. Michaelson, Special Assistant Attorney General. Hereafter it will be referred to as the State. Mr. Michaelson appeared in person. The defendant-appellant was represented by Franklin B. Stevens, its attorney. He appeared in person. Hereafter it will be referred to as the Railway. The intervenors, the Railroad Brotherhoods and the Joint Board of Railroad Brotherhoods, were represented by Gordon Rosenmeier. The intervenors, Range Municipalities and Civic Association of Virginia, were represented by Fred A. Cina. Mr. Rosenmeier and Mr. Cina appeared in person.

The first question presented to the Court was the motions made by Mr. Rosenmeier and Mr. Cina on behalf of their respective clients for leave to appear herein. As a part of the files of the District Court of St. Louis County there is a notice of motion by Mr. Rosenmeier on behalf of the Railroad Brotherhoods for an order granting leave to intervene herein "if they are not now parties to the proceedings in this court." Attached to said notice is an affidavit setting forth the grounds. Similarly there is a notice of motion by Fred A. Cina on behalf of the Range Municipalities and Civic Association for intervention herein "as a complainant" in this action. Attached to the notice is a motion setting forth the grounds. After hearing arguments, the Court permitted the "intervenors" to appear and to present evidence and make arguments. It did not determine whether they were "parties" in the technical sense to the proceedings before the Commission and as such entitled to notice of appeal, neither did it determine that they were parties in the technical sense in this court so as to entitle them to do more than to participate in the hearing, present evidence and arguments.

At the close of the evidence, the attorneys asked for opportunities to file briefs. The last brief was received October 2nd, 1954.

Some 23 objections were made by the appellant called "oral objections of appellant to the order of the Commission." The Court has considered each of them and deems them insufficient on which to base an order dismissing the appeal.

The Court now finds that the evidence supports the findings; the findings support the "conclusions"; the findings and conclusions support the order, and the order is lawful and reasonable.

As a conclusion of law the Court determines that the plaintiff-respondent is entitled to judgment affirming the order appealed from.

Let judgment be entered accordingly.

The following memorandum is made a part of these findings, conclusions and order for judgment.

A stay of 40 days is entered.

Dated January 11, 1954 [1955]

GUSTAVUS LOEVINGER
Judge of the District Court

MEMORANDUM

This proceeding appears to be somewhat complicated.

There was first a proceeding begun by the Railway by an application dated March 5, 1952, to be permitted to abandon certain passenger service. This hearing was had on June 17, 18, 19 and 20, 1952. An order dated November 7, 1952, followed this hearing, permitting the abandonment of the passenger service here involved to become effective May 15, 1953. Thereafter, a proceeding was instituted by the Range Municipalities and Civic Association for a hearing. This was had on December 11, 1952, but no order was ever issued as a result. Thereafter, the Commission on its own motion commenced a proceeding by an order to show cause why the passenger service should not be restored. This order was issued April 15, 1953. A hearing was had on May 1, 11, 12, 21, 1953. This hearing resulted in an order dated October 6, 1953, restoring passenger service but on a time schedule different from the schedules of the train service abandoned. From this order the appeal to the District Court followed. Subsequently, briefs, answering briefs and reply briefs were filed.

There were about 90 exhibits filed including transcripts in the three Commission hearings referred to.

The law is relatively simple and well-known. The hearing in the district court is not administrative. It must affirm the order of the Commission if the order is sustained by the findings and the findings are sustained by the evidence. The Court is not an appellate administrative body. It does not in any proper sense exercise any discretion. It is only when it can say as a matter of law that the evidence does not support the findings or the findings do not support the order that it has the authority to vacate an order of the Commission. Otherwise, it must affirm the order.

In considering the sufficiency of the evidence to sustain the findings, the Court does not weigh the evidence as does a jury or a judge acting as a fact-finder. The Court must determine whether there is substantial evidence, credible and competent, in the record tending to support the findings. If so, it must affirm. If not, it must set aside the order as not based on substantial, credible and competent evidence. The district court is not concerned with the discretion of the Commission in determining where the preponderance of the evidence lay.

The burden of proof of the alleged infirmity in the order rests on the appellant, the Railway.

For brevity and clarity the proceedings before the Commission on the complaint of the Railway will be hereafter referred to as the first hearing and the proceedings on the Commission's own motion will be referred to as the second hearing.

At the outset the jurisdiction of the Commission to institute, hear and determine the second hearing was questioned before the Commission and in this court. All of the objections raised by the Railway have been considered. The Court is of the opinion that none of them is fatal to the jurisdiction of the Commission or this Court. To take up and discuss

each, in detail, does not seem necessary. Some, however, will be mentioned and the basis of their disposition by the trial court stated.

The Railway makes much of the claim that it was not properly served with the order to show cause and hence the Commission never acquired jurisdiction in the second proceeding. The Railway, no doubt, could have moved to have the service on its attorney set aside. Such a motion might have been granted. Had it been, service could then have been made on an officer. The Railway chose not to make such a motion. On the contrary, it led the Commission to believe it accepted the service of the order to show cause by complying with its provisions in the posting of notices. It prepared fully for the hearing. Having in mind the unique and perhaps somewhat anomalous situation here, the Commission may well have believed that it should serve the attorney. There is no claim that he was not the attorney for the Railway at the time of service nor that the handling of this proceeding was not within the scope of his employment. There is no claim that the Railway was misled or prejudiced by service on its attorney. Under the circumstances here, the Court is of the opinion that service on the attorney was sufficient to invest the Commission with authority to proceed with the investigation in the absence of any motion, claim of prejudice and the intimate connection, in time and subject-matter, of the second investigation with the first.

Perhaps the next claim which should be considered is the Railway's claim that it did not get a fair hearing. It cites instances which it claims show that the Commission prejudged the investigation adversely to the Railway and that the Commission was not an impartial tribunal. It claims the Commission ousted itself of jurisdiction by disclosing that

it was not acting with impartiality. In effect, it is a claim that the Commission acted arbitrarily and capriciously. The Court has considered each alleged disclosure of prejudgment. It is unable to conclude that this claim has been substantiated.

One of the points much urged by the appellant is that since the order of November 7, 1952, authorizing the discontinuance of the train service, is "final," it is an "absolute bar" to the subsequent October 6, 1953, order, re-establishing the train service. Much argument is devoted to the question whether the second proceeding instituted by the Commission on its own motion by the order to show cause was a new proceeding or a continuation and "re-examination" of the first proceeding. It seems to the Court that this is largely a dispute about labels. The second proceeding partakes in fact of the nature of both an original investigation and necessarily a re-examination of its previous order.

It is elementary that the Commission is not bound by the rules of res judicata which bind a court, neither is it required to pay respect to the doctrine of stare decisis as are judges. The so-called "finality" of an order does not mean that the Commission is foreclosed from re-examining the basis of any of its orders or from instituting a new investigation anent the same questions involved in a prior investigation. Perhaps this point is emphasized by the fact that the Commission cannot appeal from its own order since it is not "aggrieved" nor a "party" to the proceeding. The regulatory power of the Commission is continuous and cannot be surrendered.

Undoubtedly the second Commission proceeding was a "re-examination" of the matters considered in the first proceeding. It was a new proceeding. If it was a "continuation" of the first proceeding, it was made such by the Railway in

introducing the record in the first proceeding. But whether it be labeled a "new proceeding" or a "continuation of the first proceeding" or a "re-examination" of the order in the first proceeding does not go to the jurisdiction of the Commission and does not foreclose it from conducting the second investigation to its conclusion in an order.

Some point was made by the Railway that the intervenors were not parties to the hearings before the Commission and therefore not entitled to be heard as parties in the court hearing. If the intervenors were parties to the hearings before the Commission, then there is a jurisdictional question involved as to the appeal to the courts. There appears some uncertainty as to what kind of participation in the hearings of the Commission is necessary to make a participant a party. In view of the conclusions reached by the Court on the merits of the appeal, it seemed unnecessary to decide this point.

Similarly, the Railway objected to permitting the intervenors to become parties to the court proceedings. If intervenors were parties below, there is no problem. If they were not parties below the court, as appellant seems to concede, could permit intervenors to become friends of the Court and as such could give them the right to participate in the hearing to the extent of offering evidence, examining and cross-examining witnesses and presenting arguments and briefs. This was done. In view of the order of this Court herein, the intervenors presumably are not aggrieved, and the question whether they are or are not parties may be largely academic.

One of the claims of the Railway is that the order requiring resumption of passenger train service is a departure from the matters to be considered under the order to show cause. It is the understanding of the Court that an investigation by the Commission of the establishment or re-establishment of a

common carrier service does not limit the order which may eventually be made as to the way in which the service is to be rendered. To be specific, the subject investigated was the resumption of passenger service formerly rendered. The Commission after such investigation might conclude that passenger service should be re-established but might vary the time schedules, the equipment or any other aspect of the service which came within its jurisdiction. The Commission may find passenger service necessary and convenient but may also find that public necessity and convenience require its establishment or re-establishment on conditions varying from its former conditions.

There is no dispute about the passenger operations here in question resulting in a substantial loss to the Railway. The Commission was fully aware of this in making its order. It is also made to appear that the total operations of the Railway, both passenger and freight, are very profitable. There is no claim of confiscation. While the financial loss to the Railway is an important factor in considering the question of abandoning the service, it is not conclusive or even decisive. Since it is obvious that this factor was not overlooked by the Commission but presumably given due weight, this Court cannot upon this ground vacate the order.

In this connection it is interesting to note the argument of the Railway that the loss in revenue is passed on to the public by increased charges. The argument is two-edged. If this argument is sound, it has little cause to complain. Its losses are absorbed in increased rates. The real complainant should then be the public represented by the State. But the State does not complain.

Looking at the situation realistically, it is likely that the Railway must bear the loss. It is doubtful whether the passenger traffic losses will result in increased freight rates.

Under the record there does not appear to be any need for such increases. The Railway is pictured as a very profitable enterprise even though its passenger traffic involves very substantial losses.

The Railway produced tables to show the daily passenger patronage of the trains by stations and the daily cost. It is doubtful whether such a breakdown is realistic or helpful. In any event, the Commission could and apparently did take the over-all view of the territory, its population and its use of the trains. True, this still shows a pecuniary loss. But to reduce the calculations to a daily figure seems to the Court to involve a distortion that could easily create a misapprehension. Even in the field where the data appears to be reduceable to mathematical certainties, such seeming certitude is somewhat illusory. There are always connotations and related factors which affect and may invalidate the inferences sought to be drawn from such evidence.

The territory which this passenger traffic serviced is a fairly populous one taken as a whole. The Commission could infer that with the coming of the St. Lawrence waterway, the taconite industry and the increase in the population generally, the population of this area might be expected to grow in the foreseeable future. There may be considerable through traffic from various parts of the United States to the Range communities and vice versa which may reasonably be expected to increase. That such a large rural and urban population should be without rail passenger service might well have seemed to the Commission to amount to public inconvenience.

The growth of this area is likely to be progressive in freight as well as passenger traffic thus absorbing the loss from the seemingly nearly universal unprofitableness of short-haul passenger service.

As the Court understands it, the Commission expressed the view that passenger traffic would increase if the Railway made an effort to make travel by rail more attractive. It seems fairly clear that the Railway has not used modern facilities to attract passengers. The Commission made no order as to newer and more modern facilities. But in so far as passengers were deterred from using these trains because of antiquated, outmoded and ill-ventilated facilities, they have helped to bring this situation upon themselves at least in part.

Another complaint of the Railway is the order of the Commission changing the time schedule. Complaint is made by the Railway that it had no notice that the Commission would change the time schedule of the trains and also that the time schedule is impossible to meet.

The record indicates that there was considerable evidence bearing on the question of the added convenience to prospective train travelers if the time schedules were changed. This was sufficiently gone into so that the Railway had ample opportunity to be heard on it. In fact, the Railway introduced a substantial body of evidence on this point. It is believed the order was within the jurisdiction of the Commission and within the scope of the investigation.

Whether the time fixed by the Commission for the run from Hibbing to Duluth and return is impossible as a practical operation, may be a matter of experience and experiment. The Commission is presumed to be experienced and expert in the matters over which it has jurisdiction. Should the running time prescribed by the Commission prove to be too short, no doubt the Commission would grant adequate relief and the courts give the Railway adequate protection.

The Railway asserts that the passenger needs of this territory are being adequately met by bus service, short run,

long run and interstate. It is also pointed out that from some points there is also air service. As the Court understands it, it is not the purpose of regulation to eliminate competition between common carriers furnishing different types of service. The purpose of regulation was originally intended to eliminate "cut-throat" competition between similar carriers and prevent favoritism and discrimination in a public service.

There is a substantial dissimilarity in train and bus passenger service. To many, train service may seem preferable to bus service, if both are available and reasonably comparable in quality of service. Train service unquestionably is a public convenience. Under some circumstances it may be a necessity. The large number of buses serving this area, according to the Railway, would indicate a very large amount of passenger travel. That much of this could be recaptured by trains, reasonably modern in equipment and running on reasonably convenient schedules, was what the Commission apparently had in mind. This Court is not able to say that this determination was arbitrary or capricious.

Much is made of the increased travel by private automobiles to the disadvantage of trains. It is noteworthy that private autos seem to be feeders to travel by bus and by airplane. If the railways are losing out to the buses, it is not entirely due to the increase in travel by private automobiles. The Commission emphasized the need for the Railway to modernize its equipment and time schedules. If it does, it may meet the competition of the bus.

The Court is not unmindful of the fact that the train has been discontinued for a considerable time. It is not possible to foresee with certainty whether the re-establishment of train service will be a new attraction, increasing the passen-

ger traffic or whether the lengthy disuse of train service will minimize the future demand for it. The Commission is within its jurisdiction if it considers the re-establishment of this service desirable at least on an experimental basis for a reasonable period to give the public time to adjust to it.

The overall question whether passenger train service to and from the communities here involved is a public convenience and necessity is not wholly free from doubt. This is apparent in that the order permitting the abandonment of the service and the order re-establishing it were each by a divided Commission. However, the courts cannot interfere with the exercise of a legislative function by an administrative tribunal, created by the legislature, because it is not unanimous. Having in mind that the burden of proof of the unreasonableness of the order rested on appellant, the Court was unable to find that this burden had been sustained.

LOEVINGER, J.

APPENDIX "E"

BEFORE THE
RAILROAD AND WAREHOUSE COMMISSION
OF THE STATE OF MINNESOTA
Paul A. Rasmussen, Chairman
Clifford C. Peterson, Commissioner
Ewald W. Lund, Commissioner

In the Matter of the Investigation of the Reestablishment of Service by the Duluth, Missabe and Iron Range Railway Company of its Passenger Trains Nos. 1, 2, 11, 12 and 14 and Bus Service Contributory to Trains Nos. 1 and 2 between Wilpen and Buhl, Minnesota.

A-7168-3

REPORT, FINDINGS OF FACT AND ORDER

The above entitled matter came on for hearing before the Commission at Hibbing, Minnesota, on May 1, 1953, pursuant to an Order to Show Cause approved and issued by the Commission on April 15, 1953, against the Duluth, Missabe and Iron Range Railway Company, hereinafter known as the Respondent, why said Respondent should not be required to re-establish Passenger Trains Nos. 1, 2, 11, 12 and 14 and bus service contributory to Trains Nos. 1 and 2 between Wilpen and Buhl, Minnesota. Commissioners Paul A. Rasmussen and Clifford C. Peterson presided. The hearing was then adjourned to May 11th and again to May 21, 1953. The hearings consumed four days; eight witnesses testified on behalf of the Respondent, of whom four were employed directly by it, two were employed by the Railway Express Agency, one by the St. Louis County Board of Education, and the other is the Postmaster at Hibbing. Twenty-four witnesses testified on behalf of the intervenors in support of

the Commission's Order to Show Cause. Some of these witnesses represented business interests and others were individuals interested in the re-establishment of the above mentioned passenger train service. Many more witnesses who came to the hearing on May 1st from various towns who will be affected by the decision in this proceeding could not be heard because each of them had to return to their respective towns by rail by 1:15 p.m., the time that Train No. 2 leaves Hibbing for Duluth. Train No. 1 arrives at Hibbing at 11:38 a.m. This allowed only one hour and thirty-seven minutes for these witnesses to testify. These witnesses desired to testify, but in order to do so it would have been necessary for them to stay overnight and take Train No. 2 back to their respective towns the following day.

The following appearances were entered:

Franklin B. Stevens, Attorney, Duluth, appeared specially for the Respondent and objected to the jurisdiction of the Commission.

On behalf of the intervenors: Fred A. Cina, Attorney, Virginia, Minnesota, for the Range Floral, Hibbing, Range Municipalities and Civic Association of Virginia and as State Representative; Louis R. Bachnik, Hibbing, Minnesota, for the Range Floral; Frank H. Wilson, Practitioner, Duluth, for the Order of Railroad Conductors and Railroad Brotherhoods; L. J. Covey, Practitioner, Minneapolis, for the Brotherhood of Railroad Trainmen and Joint Board of Railroad Brotherhoods; Robert W. Aiken, Practitioner, St. Paul, for the Brotherhood of Railway Clerks and the Joint Board of Railroad Brotherhoods; Victor J. Hultstrand, Attorney, Hibbing, for the Hibbing Chamber of Commerce; Paul B. Widstrand, Legislative Representative, Hibbing, for the public; J. W. Huhtala, Attorney, Virginia, City Attorney

for the City of Virginia; Senator Homer M. Carr, Proctor, for the Brotherhood of Locomotive Engineers; Loren S. Rutter, Legislative Representative, Kinney, Minnesota; Eugene E. Bangs, Attorney, Chisholm, City Attorney for Chisholm; Senator Elmer Peterson, for the St. Louis County Club and Farm Bureau and for the Hibbing Chamber of Commerce, Transportation, Committee; and J. W. Peterson for Forbes Farm Club.

Oliver A. Ossanna, Secretary and Attorney, appeared on behalf of the Commission.

Counsel for the Respondent at the commencement of the hearing on May 1st presented four separate motions to the Commission. The first was that the Order to Show Cause should be dismissed because no proper service had been made on the Respondent; the second asked for dismissal of the proceeding on the ground that it was essentially a rehearing in Docket A-7168 and the order of the Commission dated November 7, 1952; the third asked for dismissal on the ground that the hearing of May 1, 1953, was premature and the fourth asked for dismissal on the ground that no other party had a right to appear or participate in the proceedings except the Respondent. Each of said motions were denied and properly so. Each of said motions will be considered in the order set forth herein:

(A) Counsel for the Respondent appeared specially and objected to the jurisdiction of the Commission on the ground that service on the Order to Show Cause in this matter was not made upon said Respondent and that therefore said order should be dismissed. Section 216.17, M. S. 1949 provides in part that "Service may be made of all notices, orders, and other papers by mail upon any person or firm, or upon the president, general manager, or other proper executive

officer of any corporation interested. If any party has appeared by attorney, such service shall be made upon such attorney." The Commission, as has been the practice for many years past in dealing with matters relating to railroad service, has always served counsel representing the railroad. There has never been any objection to this form of notification and in this instance it is common knowledge that Franklin B. Stevens is and has been one of the attorneys for the company for many years past and has been recognized by this Commission as being a duly authorized person to accept service of notices and orders issued by this Commission. The Commission had no reason to believe otherwise. The original application in Docket A-7168 which requested an order of this Commission for authority to discontinue the passenger train service hereinabove referred to, was signed

"Duluth, Missabe and Iron Range Railway Company
By Franklin B. Stevens /s/
Franklin B. Stevens
Its Attorney
700 Wolvin Building
Duluth 2, Minnesota."

A regulatory body such as this Commission is given a great deal of latitude in the procedure that it follows. This Commission at no time received any notice from the company that Franklin B. Stevens was no longer its attorney. The Supreme Court has held that where a party participates in the proceedings, regularity as to service is not important. The Supreme Court of this State has said "—where respondent appeared and participated in the proceeding, the regularity as to notice, answer and reply was not important." (Western Buse Tel. Co. v. Northwestern Bell Tel. Co., 1933, 188 Minn. 524, 248 N. W. 220) In State v. Tri State Telephone and

Telegraph Co., 1939, 204 Minn. 516, 284 N. W. 294, the Supreme Court said "an administrative body, such as the Railroad and Warehouse Commission, even when acting quasi judicially, is free of many of the procedural checks which circumscribe the action of a court."

Counsel for the company was mailed a copy of the Order to Show Cause on April 15, 1953. The hearing on the Order to Show Cause was set for May 1, 1953. He had fifteen days within which to notify the Commission that improper service was made if such were true. He also had sufficient time within which to take an appeal to the proper district court if in his judgment the Commission had exceeded its authority and if, by having served him, a substantial right of the company had been violated. The Commission is not impressed with counsel's argument that the Order to Show Cause should be dismissed because the company itself was not served with a notice of the same. Counsel is an agent of said company. He had within his possession knowledge of the fact that the Commission issued this Order to Show Cause and assigned it for hearing. This should have led him to make further inquiry when he received the notice. If he had made such inquiry, and the Commission believes that he did because he appeared at the hearing fully prepared to present the company's case in opposition to the Order to Show Cause, the inquiry itself would have disclosed all of the information necessary as against any further order that this Commission might issue affecting the interests of the company. In any event, if the company did not have statutory notice, it certainly had actual notice because knowledge of the fact that the Commission had issued an Order to Show Cause and assigned the same for hearing was transmitted to the company by its counsel. The Commission denied the motion of counsel for

the company and properly so. At the hearing Commissioner Rasmussen, the presiding officer, asked Mr. Stevens:

"Commissioner Rasmussen: It is not your contention, Mr. Stevens, that as Attorney for the DM&IR you were not aware of the fact that this hearing was called here today?

"Mr. Stevens: It is not my contention, no, sir. My contention is, no statutory service has been made upon the DM&IR railroad.

"Commissioner Rasmussen: And you do not deny you are their attorney?

"Mr. Stevens: No, I do not deny that. I am appearing specially for the DM&IR." (Tr. p. 11)

(B) Counsel for the company then moved for dismissal of this proceeding on the ground that it is essentially a re-hearing in Docket A-7168 and it is an attempt to modify a final order of the Commission. There is no foundation for making this claim. The Commission is well aware of the fact that the order it issued on November 7, 1952, in Docket A-7168 became a final order when no appeal was taken from said order by any party adversely affected thereby within thirty days from the date of service on the parties. That order authorized the company to discontinue the trains and contributory bus service hereinabove mentioned effective on or after May 15, 1953. If that order was final, and counsel for the company agrees that it is a final order, then logically the matter before the Commission now is not a re-hearing. The former matter was for the purpose of determining whether or not certain passenger trains were to be discontinued. This Order to Show Cause was heard for the purpose of determining whether or not certain passenger train service should be re-established, and therefore the motion of counsel is without merit.

(C) Counsel then moved the Commission for dismissal on the ground that the hearing of May 1, 1953, was premature. The hearing on a new matter cannot be premature when the new matter has not been heard. This new matter is to determine whether or not public convenience and necessity requires that the train service involved herein should be re-established. The hearings held in 1952 were for the purpose of determining whether or not the application of the company for the discontinuance of passenger train service afforded by the trains named therein should be granted or denied. At that time after a full and complete hearing, the Commission determined by a two to one vote that the application should be granted.

(D) Counsel for the company then moved for dismissal on the ground that it objected to the appearance or participation by any other parties except the company and that there was lack of procedural due process. In his argument, counsel relied on Section 216.13, M. S. 1949. Counsel argued that the company is called upon "to answer something which it does not know, is not in a position to prepare its case. We do not know what the contentions of the party are.—" (Tr. pp. 18, 19) It is quite obvious that Section 216.13 is inapplicable to the proceeding before this Commission. This is not a matter of a formal complaint being filed by a third party, in which case the respondent is given an opportunity to answer, but this is a matter that comes within the jurisdiction of the Commission conferred upon it by Section 216.12 and Section 216.21. Section 216.12 sets forth the general powers of this Commission and in part provides that when

> "—any reasonable addition to or change of its stations, station houses, or transfer facilities, or change in the mode of operating its road or conducting its business,

> will promote the security or convenience of the public, or when in the judgment of the commission the operation by any common carrier of one passenger train each way on each and every day, including Sundays, through each county-seat station on the line of such carrier will promote the security or convenience of the public, the commission by a written order,—the making of such repairs, additions or change."

Section 216.21, counsel for the company argues, is a matter that "relates exclusively to rates." (Tr. p. 14) The interpretation placed upon this section by counsel is, of course, not only very strict but erroneous. Section 216.21 provides in part that

> "The commission shall on its own motion investigate any matter relating to the management by any carrier or warehouseman of its business, or the reasonableness of any or all rates, schedule of rates, fares, charges, rules, regulations, or classifications when in its judgment the public interest requires it.—"

It will be noted that the first sentence of this section contains a number of independent clauses separated by the disjunctive word "or" and not the conjunctive "and." In other words, it appears quite definitely that the legislature intended that the Commission could use its discretion and good judgment in determining whether it should investigate one of a number of things set forth in that particular sentence. The Commission therefore in the belief that it is vested with the authority to "investigate any matter relating to the management by any carrier or warehouseman of its business," did issue the Order to Show Cause that is now under consideration. Section 216.21 further provides that "before making any order under the provisions of this section, the carrier shall have an opportunity to be heard, upon such notice as the Commis-

sion shall deem reasonable." This Commission gave fifteen days notice on the Order to Show Cause that it issued. This certainly is reasonable notice. The company if it required more time to prepare its case or if it deemed that fifteen days notice was not reasonable notice, could have made a request upon the Commission for additional time within which to prepare its case. It is quite apparent that this was sufficient notice, for the company was fully prepared to answer the Commission's Order to Show Cause at the hearings held on May 1, 11, 12, and May 21, 1953. At the hearings on May 1, 11 and 12, the company presented twenty-eight exhibits to sustain its position that public convenience and necessity did not require the re-establishment of the passenger train service hereinabove referred to. Certainly if the company were so completely at a loss as to how to answer the Commission's Order to Show Cause, it would not have been prepared to present twenty-eight exhibits. Therefore its claim that the Commission's Order to Show Cause should have set forth in more particular what is required is without foundation.

And it having given careful consideration to the evidence adduced at the hearings in this proceeding, the Commission now makes and files the following Findings of Fact and Order:

Findings of Fact

I.

That the Respondent is a corporation duly organized and existing under the Laws of the State of Minnesota, and has been engaged in business as a common carrier by railroad of freight and passengers in the States of Minnesota and Wisconsin for many years past and until May 15, 1953, the Respondent operated the passenger trains involved herein within the State of Minnesota as follows:

Train No. 1 between Duluth and Hibbing, Minnesota, with stops at intermediate stations (Missabe Junction, 57th Avenue West, Proctor, Adolph, Munger, Saginaw, Grand Lake, Burnette, Culver, Alborn, Birch, Payne, Kelsey, Sax, Fens, Zim, Forbes, Iron Junction, Wolf, Macon, Sherwood, Wilpen, Mitchell);

Train No. 2 between Hibbing and Duluth, Minnesota, with stops at intermediate stations (same as above);

Train No. 11 between Iron Junction and Virginia, Minnesota, with stops at intermediate stations (Spruce, Eveleth, Largo, Rainy Junction);

Trains Nos. 12 and 14 between Virginia and Iron Junction with stops at intermediate stations (same as Train No. 11);

and has operated a bus line between Wilpen and Buhl, Minnesota, and intermediate points contributory to the operation of Trains Nos. 1 and 2 (Shenango and Chisholm).

For many years last past the Respondent has operated said trains and contributory bus service on the same schedule, to-wit: Train No. 1 departed from Duluth at 8:20 a.m. and arrived at Hibbing at 11:38 a.m. Train No. 2 departed from Hibbing at 1:15 p.m. and arrived at Duluth at 4:10 p.m. This schedule allowed patrons of the Respondent who left Hibbing at 1:15 p.m. and arrived at Duluth at 4:10 p.m. little or no time to conduct their business in the City of Duluth on that day. The result of such schedule was that any patron who desired to use the passenger train facilities of the Respondent would have to stay overnight in Duluth and conduct his business on the second day, stay overnight on the second day, and leave for Hibbing on the third day at 8:20 a.m. and, conversely, patrons leaving Duluth at 8:20 a.m. for Hibbing would be affected in the same manner. A

patron traveling in either direction was subjected to such additional expenses as board and lodging. This in itself made the service very unattractive to prospective patrons. The Respondent has made no attempt in at least twenty years to experiment on the possibilities of improving the traffic passenger load by instituting a time schedule that was more suitable to the needs and convenience of the traveling public. Most of the witnesses who testified for the intervenors in support of the Commission's Order to Show Cause were of the definite opinion that a more convenient schedule should have been placed in effect by reversing the present schedule. If the Commission should order the reestablishment of the passenger train service hereinabove referred to, the schedule should not only be reversed, but a time schedule that would allow more time in both Duluth and Hibbing for the patrons to conduct their business should be provided and arranged so that patrons may return to origin point the same day.

II.

There was some complaint also about the type of equipment that was used in that the coaches were unsanitary and not air-conditioned. Some of the witnesses expressed the opinion that if the Respondent had provided modern air-conditioning equipment that much more use would have been made of the passenger train service. The Respondent's witnesses admitted that no attempt had been made over the years to solicit or encourage the traveling public to use the services that existed. In fact, the Respondent allotted the insignificant sum of $240.00 for advertising in 1952.

III.

The distance by rail between the Duluth Union Depot and Hibbing is 84 miles. On the schedule that the Respondent was operating it took three hours and eighteen minutes to travel from Duluth to Hibbing and on the return trip two hours and fifty-five minutes. Therefore, Train No. 1 operating from Duluth to Hibbing traveled at an average speed of approximately 25.4 miles per hour. On the return trip it traveled at an average speed of 28.8 miles per hour. The Respondent's right of way is in excellent condition and is susceptible to much higher speeds. (Tr. Vol. IV, p. 649). When in the fall of 1952 President Truman visited Hibbing, the Respondent placed a restriction on his special train of sixty miles per hour. The Respondent admitted that its road bed can stand a speed of more than sixty miles an hour "on tangent track." (Tr. Vol. IV, p. 650) IV

It is common knowledge that most of the state and county highways in the northwestern and eastern part of the state particularly in the area served by the Respondent herein are composed of gravel and tarvia surface. It is also well known that gravel and tarvia roads in Minnesota are usually posted with certain limitations during the so-called spring breakup. As an illustration, the highway between Grand Lake and Saginaw and State Highway No. 7 which parallels the Respondent's tracks to the range area and which has a gravel base and a light bituminous surface are in a deteriorated condition and are not suitable to heavy traffic particularly during the spring breakup. The highway between Burnette and Culver and Culver and Alborn is of a similar type of construction. The traffic flow between these points is very light. In fact, between Burnette and Culver the traffic flow amounts to 46 cars for each 24 hours and between Culver and

Alborn approximately 54 units per hour. The highway between Alborn and the Miller Trunk or U. S. Highway 53 is in excellent condition. U. S. Highway 53 is an all-weather highway and the highway between U. S. Highway 53 (Miller Trunk) and Meadowlands, known as State Highway 133 has a bituminous top. A portion of State Highway 7 is constructed of gravel and the other of tarvia.

V.

The county engineer in charge of road construction in St. Louis County testified that during severe snow storms the main highways here mentioned are open within 24 hours, but that it takes a few days to open the feeder highways. Most of the highways adjacent to or in the commercial area of the towns and villages affected by this proceeding and that were served by the Respondent's passenger trains hereinabove referred to are posted during the spring breakup. For the most part these highways are limited to a six-ton gross weight. For that reason the Northland Greyhound Lines is not permitted to use State Highway 133 that runs in an easterly and westerly direction between Meadowlands and U. S. Highway 53 (Miller Trunk). During the spring breakup, the State Highway Department limits the use of said road to a six-ton gross weight. The highways throughout the entire area that are limited to a six-ton gross weight cannot be used by either bus or truck operators whose individual bus or truck units exceed that gross weight. It is common knowledge that neither the Northland Greyhound Lines nor any truck company can operate any unit either from Duluth or Hibbing to the various towns involved herein without an operating loss when the gross weight is limited to a six-ton gross weight limitation.

VI.

That Northland Greyhound Lines, Inc., operates a common carrier bus service between Duluth and Hibbing via State Highway No. 53 with service to various points on said highway including Independence, Cotton, Eveleth, Virginia, and from Virginia to Hibbing on U. S. Highway 169, Mountain Iron, Buhl, Chisholm, and Hibbing. On U. S. Highway 169 there are a few villages that are near but not adjacent to said highway. Said company also operates one round trip daily except during the restricted posted season from the junction of State Highway 53 and 133 to the junction of 133 and No. 5, thence north on No. 5 to 216 and 216 to Hibbing. The petitioner's line parallels the greater portion of most of these two bus routes, but each of said bus routes are located several miles distant from the rail line particularly between Culver and Iron Junction and points intermediate thereto. At the time of the hearing on May 1st and prior thereto, the bus route on Highway 133 and 5 was posted and limited to a six-ton gross weight. During this period the people living along this route had no immediate form of public transportation. Highway No. 7 from Alborn to Iron Junction parallels and is adjacent to the railway line. This road can be used by patrons of the rail line but is several miles distant from Highway 53 between Alborn and Iron Junction and villages and towns located intermediate thereto. The towns and villages located between Alborn and Iron Junction are adjacent to the rail line (Alborn, Payne, Kelsey, Sax, Fens, Zim, Forbes, Iron Junction). With passenger train service even during the most inclement weather the public is able to reach the depots just mentioned. Without passenger service it is necessary for these people to travel from five to seven miles by car to Highway No. 53. Everyone

knows of the difficulties encountered during the severe winter weather that is commonly experienced in this area in attempting to reach State Highway No. 53, in order to board a Northland Greyhound bus.

VII.

Prior to May 15, 1953, when the passenger trains hereinabove referred to were in operation, the public was reasonably satisfied with the postal and express service afforded by rail. Since said date, the United States Government has established star route service to all of the towns involved herein. It was necessary also to arrange for express service by motor vehicle in order to handle express shipments between Duluth and Hibbing. However, the Railway Express Agency when it filed its application for a certificate of public convenience and necessity as an auto transportation company in the transportation of express limited its express service to Duluth, Eveleth, Virginia, Buhl, Chisholm and Hibbing. This service was also limited to commodities generally moved by express service. Express service by motor vehicle is on a five-day week basis, Monday through Friday, while express service that was afforded by rail was afforded daily. The Respondent in its belief that it is only necessary to show an out-of-pocket loss on a certain portion of the service it renders in order to justify its opposition to the Commission's Order to Show Cause in this matter, is completely oblivious to the fact that it is a public utility and as such owes a duty to render certain services to the public even though the rendering thereof may result in an actual net operating loss for that operation. The Commission must give consideration not only to the inconvenience that results from the lack of passenger train service, but must also consider the loss of other services that are incidental to the operation of a pas-

senger train, for example, mail and express service. This Commission has the right to consider, in addition to other factors, the loss of service by rail of mail and express in connection with public convenience and necessity in determining whether or not certain passenger trains should be re-established, as much as whether under similar circumstances an application for the abandonment of certain services should be granted. All of the following towns are left without any public transportation service: Grand Lake, Burnette, Culver, Alborn, Birch, Payne, Kelsey, Sax, Fens, Zim, Forbes, Iron Junction, Wolf, Macon, Sherwood, Wilpen and Mitchell.

VIII.

That the City of Duluth, which is the county seat and one of the terminals of the Respondent has a population of approximately 100,000 people and the range area affected has a population of about 70,000 (1950 census) and is left entirely without passenger train service. At the same time the range area affected by the discontinuance of the passenger trains hereinabove set forth is one of the greatest iron ore producing areas in the world. The Respondent has in the past, is at present, and will for some time in the future enjoy one of the heaviest and most concentrated and profitable freight movements from the range area to the City of Duluth. For many years last past the Respondent has enjoyed a substantial net return on its overall operation. The loss incurred from the operation of the passenger trains herein referred to is negligible when compared with the net railway operating income of the Respondent. It is inconceivable that cities and villages having a population ranging from a few thousand to one hundred thousand should be left without a convenient and comfortable means of public transportation such as that which can be afforded by rail service.

IX.

Witness Ted Williams, a resident of Chisholm and president of the Chisholm Chamber of Commerce, testified that the Chamber is in favor of having passenger train service re-established. The Chisholm Chamber of Commerce consists of 230 members that are representatives of a great variety of businesses in that city. He stated that to leave Chisholm without passenger service would adversely affect the economy of that community and that if the time schedule were changed that it would be more convenient for the people.

Witness Paul Kochevar, postmaster of Hibbing, testified that if fast modern transportation service were provided and the time schedule were reversed and the train speeded up so that the entire trip one way would not take more than an hour and a half to an hour and forty-five minutes, it would be an incentive for the people to use the rail service.

Senator Homer Carr, an experienced rail engineer and who has been a representative of a large part of the area affected here for many years last past, also stated that if the time schedule were reversed it would meet the "criticism and objection of the people on the range and along the right of way,—." He testified that this change of schedule would better meet the needs and convenience of the public. He stated that he found almost a universal expression that the public would prefer to use passenger trains so as to eliminate parking problems in the City of Duluth.

Witness Helmar E. Olson, who testified on behalf of the intervenors, is the Executive Secretary of the Chamber of Commerce of Hibbing. He stated that the Chamber had voted on May 19, 1953, to request that passenger train service be re-established. He testified that the merchants were dissatisfied with the mail service after discontinuance

of the passenger trains on May 15, 1953, and that it would be very inconvenient for the people to be left with bus service only. He stated further that the people in Hibbing and surrounding towns consisting of a population of 60,000 people will be without passenger train service of any description. Many other witnesses testified similarly.

X.

The Respondent opposes the Commission's Order to Show Cause because it claims that there is no public convenience and necessity and that it has suffered a net loss from the operation of the trains involved herein of $223,127.36 in the year 1952. However, it appears from the record that there is public convenience and necessity; it appears that certain towns and villages will be left without any form of public transportation; it also appears that the Respondent for many years has not in any way attempted to encourage the use of its service either through modernization of its equipment, solicitation or change in mode of operation (time schedule). In 1952 the Respondent incurred a loss of $558,886.00 from all of its passenger train operations. However, during the same year the net railway operating income of its entire system amounted to $5,638,186.00. This amounts to a return of 5.54% on a net investment of $101,853,864.00 after deducting depreciation and amortization plus material, supplies and cash.

For the year 1952 the operation of the trains involved in this proceeding showed a total revenue of $74,193.15 and the total expenses incurred were $298,320.51. The net loss therefrom, from said operation was $223,127.36. This loss amounts to less than 22/100 of one per cent return on the net investment and is less than 40% of the total loss from passenger operations. A comparison of the total net railway operating

income with this loss indicates clearly that the loss becomes a rather insignificant item when compared with the net operating income.

The Respondent has had over a period of many years past an operating ratio that has been seldom equaled by any other railroad in the United States. The Respondent's operating ratio for the period 1943 to and including 1952 was as follows:

Year	1943	1944	1945	1946	1947
Operating Ratio ..	47.98	49.78	66.28	56.65	56.11
Year	1948	1949	1950	1951	1952
Operating Ratio ..	57.84	67.96	62.71	68.22	73.46

The exhibits and annual reports of this Respondent clearly indicate that it is not in financial distress. Where the evidence, as it does here, supports the conclusion that there is public convenience and necessity then the passenger train service should be restored.

Conclusion

I.

The Commission concludes that the Respondent is not in financial distress.

II.

That public convenience and necessity requires the re-establishment of the passenger trains and bus service contributory thereto.

III.

That the passenger trains hereinabove referred to should be re-established on a time schedule that is more suitable to the convenience and necessity of the public.

IV.

That the pecuniary loss or profit of the Respondent resulting from the operation of a certain portion of its service is not the only criteria of reasonableness in requiring it to con-

tinue such service. The loss shown by the Respondent does not outweigh the evidence sustaining public convenience and necessity. The fact that the operation of certain passenger trains results in a loss to the carrier is not sufficient cause of itself to justify a refusal to re-establish passenger trains that were heretofore discontinued. The interests of both the public and of the Respondent must be given careful consideration. To permit the Respondent to reap substantial profits on its total operation and at the same time be allowed to abandon a part of its services that are unprofitable is to permit it to abandon its duty as a utility to the public. "The general rule is that a railroad company that desires large profits from its entire system cannot justify the abandonment of a portion thereof on the ground that its operation is attended with a loss, even though there is no general public demand for such operation." (Am. Juris., Vol. 44, p. 433; Ft. Smith Light and Traction Co. v. Bourland, 267 U. S. 330, 69 L. Ed. 631, 45 S. Ct. 249; Brownell v. Old Colony R. Co., 164 Mass. 29, 41 N. E. 107, 29 L. R. A. 169; Southern R. Co. v. Hatchett, 174 Ky. 463, 192 S. W. 694); 255 Pac. 2d 346.

V.

That the saving made by the Respondent is so negligible as compared to its total net operating railway income that it will not be projected in any saving for the benefit of the public. An area that produces from its own natural resources freight revenue which results in a net railway operating income of $5,638,186.00 certainly merits passenger train service even though that portion of its operation is operated at a loss.

VI.

That the people of Duluth and those residing in the range area should not be left without any passenger train service.

That about nineteen towns and villages are left without express service by rail.

Now, Therefore, upon the foregoing Facts and Conclusions, It Is Ordered:

Order

(Set forth above at p. 4...)

By Order of the Commission:
OLIVER A. OSANNA
Secretary

Dated at Saint Paul, Minnesota, this 6th day of October, 1953.

(Seal)

Commissioner E. W. Lund dissenting.

APPENDIX "F"

STATE OF MINNESOTA
IN SUPREME COURT
36621

State of Minnesota,
Respondent,

vs.

Duluth, Missabe and Iron Range Railway Company,
Appellant,

and

Order of Railway Conductors, et al, Intervenors,
Respondents.

ORDER FOR STAY PENDING REVIEW BY UNITED STATES SUPREME COURT

Whereas it appears from the Petition of Franklin B. Stevens on file herein that Appellant intends to appeal to the Supreme Court of the United States or to apply to the Supreme Court of the United States for a Writ of Certiorari in this proceeding;

Now, Therefore, It Is Hereby Ordered that all proceedings in the above entitled matter, except the entry of judgment in this Court, be and the same are hereby stayed pending the final decision of the Supreme Court of the United States upon Appellant's appeal or upon Appellant's Petition for a Writ of Certiorari, and should the Supreme Court of the United States grant a Writ of Certiorari and review the judgment of the Court herein, then all proceedings herein shall be and the same are hereby stayed until the final determination of the Supreme Court of the United States on such Writ of Certiorari.

The parties hereto having by stipulation waived a stay or supersedeas bond, the filing of such bond is not required as a condition to the granting of this stay.

Dated March 15, 1956.

By the Court:
ROGER L. DELL
Chief Justice

APPENDIX "G"

BEFORE THE
RAILROAD AND WAREHOUSE COMMISSION
OF THE STATE OF MINNESOTA
Ewald W. Lund, Chairman
Clifford C. Peterson, Commissioner
Elling A. Knutson, Commissioner

In the Matter of the Application of the Duluth, Missabe and Iron Range Railway Company for Permission to Discontinue the Operation of Its Passenger Trains Nos. 1, 2, 11, 12 and 14 and Bus Service Contributory to Trains Nos. 1 and 2 Between Wilpen and Buhl, Minnesota.

A-7168

REPORT, FINDINGS OF FACT AND ORDER

The above entitled matter came on for hearing before the full Commission at Hibbing on June 17th and 18th and on June 19th and 20th, 1952, at Duluth, Minnesota. The Duluth, Missabe and Iron Range Railway Company, the Petitioner herein, is requesting an order of this Commission authorizing it to discontinue the operation of its Passenger Trains Nos. 1, 2, 11, 12 and 14 and bus service contributory to Trains Nos. 1 and 2 between Wilpen and Buhl, Minnesota. The following appearances were entered:

(Appearances omitted.)

Due and proper notice of the hearing was given; and the Commission having given careful consideration to the evidence adduced at said hearing, together with the law applicable thereto, the Commission now makes and files the following Findings of Fact and Order:

Findings of Fact

I.

The application herein was filed by the Petitioner on March 6, 1952, for authority to discontinue the operation of the passenger trains and the auxiliary bus service hereinabove referred to pursuant to Section 216.62, M. S. 1949.

II.

Train No. 1 operates daily from Duluth to Hibbing; Train No. 2 daily from Hibbing to Duluth; Train No. 11 daily from Iron Junction to Virginia; Trains Nos. 12 and 14 daily from Virginia to Iron Junction, and bus service daily except Sunday, under contract with the Chisholm Transportation Company between Wilpen and Buhl. The time schedules and the distance in miles of said operations appear in Appendix "A" attached hereto and made a part hereof.

III.

Trains Nos. 1 and 2 make connections for the transfer of passengers at Duluth with the Chicago and North Western Railway Company, Minneapolis, St. Paul and Sault Ste. Marie Railroad, Northern Pacific Railway, Great Northern Railway, and Duluth South Shore and Atlantic Railroad.

IV.

All trains and the auxiliary buses presently handle express shipments for the Railway Express Agency and mail for the United States Government under contracts without dates for termination.

V.

The Northland Greyhound Lines, Inc., a duly authorized common carrier of passengers, operates eight buses daily between Duluth and most of the points in the area involved herein, all of which are enumerated in Appendix "A"; the Duluth-Superior Transit Company operates buses between

Proctor and Duluth every half hour with 15-minute service during rush hours; the Duluth, Winnipeg and Pacific Railway serves Duluth and Virginia; and air service is available at Hibbing, Minnesota.

VI.

Appendix "B," attached hereto and made a part hereof, sets forth the population of the various cities and villages involved in this proceeding, together with the distance in miles from the present railroad passenger train facility to the nearest other common carrier service, and Appendix "C", attached hereto and made a part hereof, is a comparison of the rail and bus fares.

VII.

For the year 1950 Petitioner carried 12,066 passengers and derived therefrom a gross revenue of $8,151.87, and for the year 1951 it carried 12,434 passengers and derived therefrom a gross revenue of $7,334.20, or an average of $679.32 and $611.18 per month for 1950 and 1951 respectively. For the first five months of 1952 it carried 5,232 passengers and derived therefrom a gross revenue of $2,897.18 or an average of $579.43 per month. There were 2,639 non-revenue passengers carried in the months of April and May of 1952.

VIII.

To a large extent the loss of passengers and consequently the large loss in revenue is directly attributable to the tremendous increase in the motor vehicle registration in St. Louis County from 1932 to 1950, inclusive. In 1932, 42,991 vehicles were registered, and in 1950, 72,994. The passenger car registration increased from 303,730 to 944,272 from 1921 to and including 1950, and passenger bus registration increased from 419 in 1942 to 3,245 in 1950 in the State of Minnesota.

IX.

The operation of the trains and bus service involved herein caused the Petitioner a loss of $195,735.03 for the year 1951, based on an average loss for the past five years, as follows:

SUMMARY OF REVENUES AND EXPENSES

REVENUES		
1.	Passenger	$7,334.20
2.	Mail	53,196.31
3.	Express (Estimated)	13,623.75
		$74,154.26
OPERATING EXPENSES		
1.	Wages of Enginemen and Trainmen	53,876.66
2.	Locomotive Fuel and Supplies	54,607.22
3.	Locomotive Repairs and Enginehouse Expense	71,422.85
4.	Passenger Car Repairs and Supplies	37,350.86
5.	Duluth Union Depot and Tracks at Duluth	48,381.70
6.	Bus Transportation	4,250.00
		$269,889.29
	NET LOSS	$195,735.03

and from 1941 to and including 1951 passenger revenue losses ranged from $537,571.00 to $784,394.00 respectively. These losses also include losses that were incurred on certain train operations that were discontinued prior to the filing of this application.

X.

Petitioner's rate of return on its investment from all operations (freight and passenger) for the period 1949 to and including 1951 was as follows: 1949 — 6.299%, 1950 — 7.189%, 1951 — 5.111%.

XI.

The average fare for each passenger for the year 1951 was slightly in excess of 58c per passenger, and to offset the present deficit in the operation of the services involved herein, it would be necessary to attract an additional 330,000 passengers. The protestants declared that the loss in passenger revenue is due to poor service and time schedules and outmoded equipment, and that travel by rail is discouraged rather than invited. The handling of U. S. Mail is a governmental problem that would have to be solved by the postal authorities. That is a matter over which this Commission has no jurisdiction. In other areas where passenger trains have been abandoned, the postal authorities have established Star Route Service. It is common knowledge that the handling of mail by Star Route Service is generally a better service than is afforded by the average rail mail service.

XII.

It is regrettable that the passenger trains and bus service involved herein are not patronized to an extent which will permit Petitioner to continue their operation and pay the out-of-pocket cost of such operation from the revenues received. This Commission is cognizant of numerous Court and Commission decisions which hold that a railroad should not be required to continue the operation of passenger trains which show such a disproportion of losses as to indicate that they are not substantially used nor needed by the public. The out-of-pocket annual loss here is $195,735.00.

XIII.

It is asserted that notwithstanding the decreased use of these trains for passenger travel by the public, the railroad nevertheless should be required to continue their operation at a loss as a public service, and in consideration of the sub-

stantial freight traffic with which it is favored by patrons along the line. However, in view of the fact that reasonably adequate passenger bus service is furnished to most of the points involved herein, such argument loses its force. It would not seem to be for the benefit of the public to force Petitioner's freight operations to absorb the substantial out-of-pocket losses sustained in the losses incurred in the operation of present services. Freight rates on iron ore and other essential commodities are now at a high level, and business interests and farmers should not have their freight service hampered nor their freight rates increased in order to permit absorption of losses resulting from passenger train operations which apparently are not patronized nor needed. There is no evidence to show that the passenger traffic on these trains will increase in the future so as to overcome the out-of-pocket losses now being sustained.

XIV.

This Commission has the deepest concern for the adequacy and type of transportation facilities available to the public, and if there were any indication that it would be possible to make this operation a paying venture, or to enable it at least to pay the cost of its operation, the Commission would be disinclined to grant the petition herein. However, the Commission cannot disregard conditions well-known to everyone. A railroad company has but limited powers of management, and in view of its lack of final power to fix rates, cannot control its revenue. Similarly, its control over operating expenses is strictly limited as the result of necessity for compliance with labor contracts entered into with nation-wide labor organizations. It is the duty of a railroad to seek, and of regulatory agencies to permit elimination of services whose operation has become wasteful due to the fact that they no

longer are needed nor used by the public to a reasonable extent. If such services are required to be operated at substantial out-of-pocket losses which can only be absorbed by revenues from essential freight services, and constantly create the need for higher freight rates, then such service should be discontinued.

XV.

Whether or not public convenience and necessity requires the operation of these passenger trains and bus service, rules and legal precedents established prior to the transportation revolution formed by public highways, private automobiles and common carrier bus, are no longer applicable for the reason that such competitive transportation services have destroyed the former railroad monopoly of the transportation business and have placed local railroad passenger train service on trains such as the ones involved herein in an adverse competitive position.

XVI.

The Commission is sympathetic toward local residents in their desire to retain these services, but in consideration of the broad public interest involved, even though there may be some inconvenience to a limited number of persons by discontinuance of the trains, we must honestly decide the issues presented.

XVII.

The Commission has given careful consideration to the Protestants' evidence regarding the condition of the various highways leading into the communities that will be affected by this application if it is granted, and for this reason it believes that if granted, the effective date of such discontinuance should be postponed to a time beyond the annual spring breakup in order to give the county authorities an opportu-

nity to rehabilitate some of the highways that serve a number of the communities involved.

XIX.

After a careful consideration of all of the evidence adduced at the hearing, it appears that the discontinuance of the operation of Trains Nos. 1, 2, 11, 12 and 14 and bus service contributory to Trains Nos. 1 and 2 between Wilpen and Buhl, Minnesota, will not result in material injury to the public, and after such discontinuance the public convenience and necessity will be reasonably adequately served by the remaining bus service, as well as the private automobile.

Now therefore, on the foregoing Facts, it is ordered:

Order

That the Duluth, Missabe and Iron Range Railway Company be and it is hereby authorized to discontinue its Passenger Train No. 1 from Duluth to Hibbing, Train No. 2 from Hibbing to Duluth, Train No. 11 from Iron Junction to Virginia, Trains Nos. 12 and 14 from Virginia to Iron Junction, and bus service contributory to Trains Nos. 1 and 2 between Wilpen and Buhl, Minnesota, on or after May 15, 1953, and that the public be given not less than ten (10) days' notice prior to said discontinuance.

By Order of the Commission:

OLIVER A. OSSANNA

Secretary

Dated at Saint Paul, Minnesota, this 7th day of November, 1952.

(Seal)

Commissioner Clifford C. Peterson absent and not voting.

At a Commission conference held at Little Rock, Arkansas, Commissioner Clifford C. Peterson did not concur with the majority and reserves the right to file a non-concurring opinion at a later date.

APPENDIX "A"

MISSABE ROUTE
DULUTH TO MESABI
CENTRAL STANDARD TIME

Read Down					Read Up
1			MAIN LINE		2
Daily	Mi.		STATIONS		Daily
A.M.					P.M.
8:20	0	Lv	Duluth, U. D.	Ar	4:10
8:26	2	"	Missabe Jct.	Lv	4:03
8:32	4	"	57th Ave. W	"	3:56
8:47	9	"	Proctor	"	3:45
8:54	13	"	Adolph	"	3:36
f 9:00	16	"	Munger	"f	3:31
9:10	23	"	Saginaw	"	3:22
9:13	25	"	Grand Lake	"	3:18
9:18	28	"	Burnett	"	3:11
9:23	31	"	Culver	"	3:06
9:37	34	"	Alborn	"	3:00
f 9:44	39	"	Birch	"f	2:50
9:57	43	"	Payne	"	2:44
10:02	47	"	Kelsey	"	2:33
f 10:09	51	"	Sax	"f	2:27
f 10:16	55	"	Fens	"f	2:21
10:21	58	"	Zim	"	2:17
10:28	62	"	Forbes	"	2:11
10:46	66	"	Iron Jct.	"	2:06
10:52	68	"	Wolf	"	1:53
f 10:56	70	"	Macon	"f	1:47
f 11:03	75	"	Sherwood	"f	1:41
11:17	79	"	Wilpen	"	1:31
11:30	82	"	Mitchell	"	1:23
11:38	84	Ar	Hibbing	Lv	1:15

COLERAINE BRANCH
CENTRAL STANDARD TIME

FREIGHT SERVICE ONLY

MI.	STATIONS
0	Duluth U. D.
34	Alborn
39	Prosit
40	Aerie Lake
46	Meadowlands
49	Elmer
56	Toivola
59	Hull Jct.
65	Silica
72	Noyes
75	Pengilly
78	Cort
79	Calumet
80	Marble
83	Holman Jct.
84	Taconite Jct.
85	Taconite
87	Bovey
88	Coleraine

EVELETH-VIRGINIA BRANCH

	1-11 Daily	Mi.		STATIONS		12 Daily		2-14 Daily
	A.M.					A.M.		P.M.
	8:20	0	Lv	Duluth U. D.	Ar	.....		4:10
	10:46	66	"	Iron Jct.	Ar	10:20		1:56
f	10:50	68	"	Spruce	Lv	f 10:15	f	1:50
	11:00	71	"	Eveleth	"	10:08		1:41
	11:12	74	"	Largo	"	9:52		1:17
f	11:15	76	"	Rainy Jct.	"	f 9:49	f	1:14
	11:22	79	Ar	Virginia	Lv	9:45		1:10

BUHL-CHISHOLM-SHENANGO

Bus Service to and from Wilpen

1 Daily	Mi.		STATIONS		2 Daily
A.M.					P.M.
8:20	0	Lv	Duluth U. D.	Ar	4:10
11:18	79	"	Wilpen	"	1:25
11:29	82	Ar	Shenango	Lv	1:15
11:34	83	"	Chisholm	"	1:10
*12:05	90	"	Buhl	"	*12:20

f — Denotes: Flag Stop
* — Denotes: Daily except Sunday
Lv — Denotes: Leave
Ar — Denotes: Arrive

APPENDIX "B"

STATIONS SERVED BY TRAINS NOS. 1-2-11-12 AND 14, POPULATION AND DISTANCE TO NEAREST POINT SERVED BY OTHER COMMON CARRIERS

Station	Population	Distance (Miles)
Duluth	104,066	0.0
Missabe Jct.	0	0.0
57th Ave. W.	0	0.0
Proctor	2,689	0.0
Adolph	200	3.6
Munger	20	3.9
Saginaw	33	1.6 or 1.1
Grand Lake	25	2.3 or 0.7
Burnett	100	6.1 or 4.2
Culver	36	6.6 or 4.2
Alborn	50	5.5
Birch	28	3.5
Payne	107	1.8
Kelsey	50	5.7
Sax	10	8.7
Fens	25	12.7
Zim	100	10.5
Forbes	25	6.0
Iron Jct.	107	5.4
Spruce	0	4.5
Eveleth	5,289	0.0
Largo	0	2.5
Rainy Jct.	50	1.7
Virginia	12,332	0.0
Wolf	0	5.0
Macon	0	3.9
Sherwood	0	3.7
Wilpen	0	0.1
Shenango) Chisholm)	6,854	0.0
Buhl	1,453	0.0
Mitchell	0	0.5
Hibbing	16,212	0.0

APPENDIX "C"

COMPARISON OF RAIL AND BUS FARES IN EFFECT JUNE 10, 1952

Between Duluth, Minn. and	One-Way Fares		Round-Trip Fares	
	Rail	Bus	Rail	Bus
Eveleth	$ 1.25	$ 1.50	$ 2.25	$ 2.70
Virginia	1.30	1.60	2.35	2.90
Wilpen	1.70	1.95	3.15	3.55
Shenango	1.65	2.00	3.00	3.60
Chisholm	1.65	2.05	3.10	3.70
Buhl	1.60	1.95	2.90	3.55
Mitchell	1.70	2.20	3.20	4.00
Hibbing	1.70	2.25	3.20	4.05

Authority — Rail—DM&IR Ry. Tariff No. 250-A, M. R. C. No. A-29.

Bus—Northland Greyhound Lines Local Tariff No. 3-4, M. R. C. No. 163.

JUL 13 1956
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM
No. 165

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,
Appellant,

vs.

STATE OF MINNESOTA, ORDER OF RAILWAY CONDUCTORS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF RAILROAD AND STEAMSHIP CLERKS, THE JOINT LEGISLATIVE BOARD AND THE RANGE MUNICIPALITIES AND CIVIC ASSOCIATION,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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Hayward-Court Brief Printing Co., Minneapolis 15, Minn.

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Statutes Cited:

M. S. A. §§ 216.12, 216.17, 216.21, 216.25 ..... 2, 11
NLR Act, USCA, Title 29, §§ 151 et seq. 10,14

In the Supreme Court of the United States

OCTOBER TERM

No. 165

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,
Appellant,

vs.

STATE OF MINNESOTA, ORDER OF RAILWAY CONDUCTORS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF RAILROAD AND STEAMSHIP CLERKS, THE JOINT LEGISLATIVE BOARD AND THE RANGE MUNICIPALITIES AND CIVIC ASSOCIATION,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

STATEMENT OF APPELLEES, STATE OF MINNESOTA, ORDER OF RAILWAY CONDUCTORS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF RAILROAD AND STEAMSHIP CLERKS, THE JOINT LEGISLATIVE BOARD AND THE RANGE MUNICIPALITIES AND CIVIC ASSOCIATION, OPPOSING JURISDICTION AND MOTON TO DISMISS.

Come now the above appellees and move the Court, pursuant to Rule 16, paragraph 1(b) of the Revised Rules of this Court, to dismiss the appeal herein on the ground that it has no jurisdiction, for the following reasons:

1. The Court is without jurisdiction because no substantial federal question is raised by this appeal.

2. That the decision of the Supreme Court of Minnesota is sustainable upon nonfederal grounds sufficient to support it.

The motion of the appellees is filed herein pursuant to the above rule of this Court, in response to the statement as to jurisdiction, the appendix included therein, the printed record, and other papers filed by appellant, which urged this Court to review on appeal the opinion and judgment of the Supreme Court of the State of Minnesota.

STATEMENT OF THE CASE

Appellant attempts to appeal from a final judgment of the Supreme Court of Minnesota affirming the findings, order, and judgment of the District Court of St. Louis County.

All of the proceedings instituted and conducted by the commission were by virtue of statutory authority.[1]

Upon appeal to the District Court the weight to be given the findings and order of the commission is prescribed by statute, and is as follows:

> "* * * Such findings of fact shall be prima facie evidence of the matters therein stated, and the order shall be prima facie reasonable, and the burden of proof upon all issues raised by the appeal shall be on the appellant. If the court shall determine that the order appealed from is lawful and reasonable, it shall

[1] *M. S. A.* §§216.12, 216.17, and 216.21.

be affirmed and the order enforced as provided by law * * *."

M. S. A. §216.25.

On page 4[2] the order of the commission is quoted, and appellant, by its argument, infers that only the validity of such order is under attack, thereby disregarding the intervening and independent decision and judgment of the District Court. The District Court, after a consideration of all of the proceedings before the commission, together with evidence adduced upon the hearing before the District Court comprising 249 pages and 90 exhibits, concluded that the findings of the commission were supported by the evidence; that such findings supported the conclusions; that such findings and conclusions supported the order; and that the order was lawful and reasonable.[3]

Appellant, by its argument, concedes that the order of the commission is supported by the evidence, and that the decision of the District Court sustaining said order as lawful and reasonable, within the meaning of those terms as defined by the statutes of Minnesota and decisions of our Supreme Court, is supported by the evidence adduced upon the hearings before the commission and the District Court.

Included in appellant's statement are matters which are not pertinent to the question of jurisdiction. Aside from the inclusion of irrelevant and trivial matters, appellant's statement is interspersed with its own characterizations, interpretations, and conclusions, which are not supported by the record, in an effort to supply a substantial basis essential to sustain jurisdiction.

---

[2] Unless otherwise indicated page reference will be to appellant's statement as to jurisdiction hereinafter referred to as Statement.

[3] Proceedings before District Court, Vol. III, pp. 1407 to 1656; findings and conclusions of District Court, Vol. I. p. 122.

On page 5 appellant poses two questions as being presented by the appeal. The first question in part reads:

> "Did bias, hostility, misconduct and prejudgment in the Commission so pervade the proceedings" as to deny appellant a fair hearing?

In its notice of appeal to the District Court from the findings and order of the commission, appellant did not assign bias, hostility, misconduct, and prejudgment in the commission, nor that it had not received a fair and impartial hearing. It appealed to the District Court "from each and every part of said order and from the rulings made by said commission relative to the jurisdiction of said Commission" (Vol. I, pp. 83, 84).

At the outset of the hearing before the District Court appellant's counsel informed the court with respect to appellant's position as:

> "Our paramount ground of appeal is, of course, that the order in this case is unlawful and unreasonable by reason of the lack of patronage on the trains and by reason of the prior valid outstanding order of the Commission permitting the abandonment of the passenger train service between Hibbing and Virginia."
> (Vol. III, p. 1440),

which was followed by 34 objections in detail, including:

> "The conduct of the Commission deprived defendant of a fair opportunity for hearing, as exemplified, in fact, by the announcement of Commissioner Peterson, prior to the receipt of any evidence that the Commission at its next regular business meeting would order the re-establishment of train service."
> (Vol. III, p. 1442)

By this specific objection appellant contended that the commission by issuing the ex parte order had prejudged the issue. The ex parte emergency order was issued by the

commission so as to continue the operation of appellant's passenger trains during the hearing. Such order was issued on May 6, 1953, to take effect on May 15, 1953, thereby affording appellant ample opportunity to test its validity by court proceedings before its effective date.

The validity of this order was upon appropriate proceedings challenged in the District Court, and the court set the order aside, not upon bias, hostility, misconduct, or prejudgment in the commission, nor for want of supportable facts, but upon the premise that "the commission was without jurisdiction in said matter" (Vol. I, p. 82). In consequence of the disposition made by the court of the ex parte emergency order, it has no relevancy to the question of jurisdiction notwithstanding appellant's numerous references to the ex parte emergency order (Statement, pp. 8, 9, 10, 11, 12, 14).

On page 18 appellant contends that by the following objection:

> "The proceedings and order of the Commission deprives defendant of the equal protection of the laws, of its property without just compensation, and without due process of law, in violation of the Constitution of the United States and the State of Minnesota."
> (Vol. III, p. 1442)

asserted in the District Court, it thereby raised the question that it had not received a fair hearing before the commission. The purpose of this objection was not upon the specific ground as now claimed by appellant that it had not received a fair hearing before the commission, but was directed to and concerned only that portion of the order of the commission which provided for a "reverse schedule" plan for the operation of appellant's trains. Appellant contended that the order to show cause and order for hearing (Vol. I, pp. 43, 44) was vague and indefinite and, conse-

quently, appellant was not advised of the fact that the notice for hearing issued by the commission contemplated any change in the plan or schedule for the operation of appellant's trains. During the hearing before the District Court appellant was given ample opportunity to be heard and present evidence not only upon this phase of the order of the commission but upon any other matter material to the issues before the District Court. Appellant was not in any manner limited nor restricted in presenting to the District Court any evidence which it deemed pertinent to sustain its position, as clearly appears from the record of the proceedings, comprising 249 pages, *supra.*

Appellant did not choose to rest its case in the District Court upon the record of the proceedings before the commission, nor upon the ground that it did not receive a fair hearing, but requested and was permitted to adduce additional evidence without limitation or restriction, subject only to its materiality upon the issues then presented.

Appellant in its statement has taken out of context isolated parts of the proceedings and placed its interpretation thereon which, when considered in light of the record, is incorrect and misleading.[4]

---

[4] On page 8 appellant states: "Following this pronouncement, appellant commenced the presentation of its case. It had scarcely begun when it was asked to yield to an intervenor. Thereupon, eleven witnesses opposed to the 1952 order were trooped through the proceeding to testify briefly in favor of continuing the service," and on pages 10 and 11 makes this characterization: "The episode referred to above, involving the interruption of appellant's case to permit presentation of opposition witnesses, was accompanied by the Commission's sanctioning of a procedure reminiscent of the long-discarded Anglo-Saxon reliance on 'oath helpers'." The truth of the matter is that appellant's counsel stated that he would be "very happy" to accede to the request made to interrupt the proceedings so as to accommodate persons desiring to testify before the commission. The record discloses that when appellant's witness Scheidker was testifying the following request was made by counsel for appellee, Range Municipalities and Civic Association: "Mr. Cina: There are quite a number of people coming in who want to be heard and who wish to take the train back. I am wondering if

Appellant's characterization, pages 11 and 12, concerning the 24 persons who were sworn en masse, and for reasons not here material did not testify, has no relevancy to the question here involved, nor is it justified by the record.[5]

The matters just considered and commented upon are not substantial, but are inconsequential and trivial; they are not matters upon the question of jurisdiction. However, appellant's characterization of these matters, and the inferences which it has drawn therefrom, together with the importance ascribed thereto by appellant, is persuasive, if not conclusive, that more substantial material is wanting.

Mr. Stevens would consent to letting us interrupt in the middle of this proceeding to put the people on so they can take the train back." to which request appellant's counsel graciously responded: "Mr. Stevens: I will be very happy, and appreciate the business." (Vol. II, pp. 675, 676). At the conclusion of the testimony of witness Scheidker the presiding commissioner Rasmussen stated: "Ladies and Gentlemen, the hearing will reconvene at this time. Prior to the recess witnesses for the DM&IR were on and they have agreed, in order to accommodate you people who, I understand, are patrons of this railroad, that you may be heard at this time. So at this time the Commission will hear your testimony." (Vol. II, p. 699).

[5] There is no law in this state, nor rule or regulation of the commission, which forbids administering oaths, required to be taken by witnesses, to more than one person at the same time. The mere fact that these persons were sworn as witnesses and their names recorded in the proceedings was of no consequence, as it clearly appears from the ruling of the presiding commissioner on counsel's motion to strike the names of these persons from the proceedings, which ruling is as follows: "Commr. Rasmussen: Well, all parties to this hearing are aware of the fact that they have not submitted to cross examination—in order to just identify the number of people who came here. There is no inference one way or another, other than the people who have been witnesses. The Commission will deny your motion." Of like import is appellant's comments on page 17: "Lacking proof or even testimony on some points, the findings also made frequent reference to matters not susceptible to judicial or administrative notice with such catch phrases as 'It is common knowledge,' and 'Everyone knows.'" The phrases "It is common knowledge" and "Everyone knows", considered "catch phrases" by appellant, occur only three times in the findings of the commission (Statement, Appendix E, pp. 73, 74 and 75) and concerns climatological and road conditions in Minnesota which are common knowledge to every Minnesotan.

The proceedings before the commission on both hearings extended over many days. The record thereof includes 1406 pages, Vol. II, pages 1 to 86; Vol. III, pages 837 to 1406. Commissioner Peterson was present at all times. Appellant in its statement cites three specific instances and quotes remarks made by Commissioner Peterson and the response by its counsel (Statement, pages 8, 13 and 14).

The opinion of the Supreme Court quotes from the colloquy between Commissioner Peterson and counsel on three different occasions, and characterizes the remarks of Commissioner Peterson as misconduct—"it should not be reversed because of the misconduct of one of the members of the commission". Op. Supreme Court, Statement, Appendix A, pages 40, 41, 44.

The remarks made by Commissioner Peterson and criticized by the Supreme Court were injudicious and indecorous. There were instances when the discussion between Commissioner Peterson and counsel for appellant became heated, which counsel recognized when, at the conclusion of the hearing, he said:

> "There have been many times during the hearing when the discussions have gotten somewhat heated." (Vol. III, pp. 1405, 1406)

We do not approve some of the remarks made by Commissioner Peterson. However, we observe that "when the discussions have gotten somewhat heated" it oftentimes provokes unkind as well as improper remarks. We are not aware of any authority which holds that "heated discussions" occurring during an administrative hearing or judicial proceeding, in which counsel for one of the parties freely participates, satisfy the jurisdictional requirement for review by this Court.

The word "bias" repeatedly appears in appellant's statement and appellant inferentially argues that the Supreme

Court in its opinion found that Commissioner Peterson was biased. The Supreme Court did not hold that Commissioner Peterson or any other member of the commission was biased or had prejudged the issues. The Supreme Court, after examining the criticized remarks made by Commissioner Peterson, concluded that appellant was not prevented from submitting all of its evidence to the commission, and that upon appeal the District Court gave appellant "further opportunity to submit whatever additional evidence it desired to submit" (Appendix A, *supra*, pp. 43, 44). No finding was made by either the district or the Supreme Court that appellant did not receive a fair trial and hearing before the commission.

Appellant's contention that any member of the commission was biased or had prejudged the case, or that appellant was deprived of a fair hearing before the commission, despite the remarks of one of its members, is not sustained by the conclusions reached by the District Court, all of which were affirmed by the Supreme Court.

ARGUMENT

The Court is without jurisdiction because no substantial question is raised by this appeal.

Appellant's entire claim and its whole argument is bottomed upon the proposition that the remarks of one of the members of the commission deprived it of a fair hearing before the commission. As pointed out, *supra*, the District Court made a finding that appellant's claim of prejudgment in the commission had not been sustained (Appendix D, *supra*, p. 55).

At the risk of unduly prolonging our objections to appellant's assertion that the Supreme Court made a finding that any member of the commission was biased, we note

appellant's statement: "Second, assuming that bias, as found by the State Supreme Court, existed on the part of Commissioner Peterson alone", and then appellant proceeds with its argument upon the assumed premise that the court made a finding of bias. The court made no such finding. In the course of its opinion the court said that there is not "any way in which we can hold a member of the Railroad and Warehouse Commission is disqualified for bias" (Appendix A, p. 43).

Appellant's argument, premised upon the theory: "assuming that bias as found by the Supreme Court exists", begins with and proceeds upon an erroneous hypothesis.

The federal cases cited on page 23 involve the validity of decisions, judicial and administrative, where the trier was biased. All of these cases involve controversies arising out of the NLR Act. USCA, Title 29, §151 et seq. This law provides for a direct appeal from the final order of the NLR Board to the Circuit Court of Appeals. When such an appeal has been taken the board is required to make a return and certification to the court, whereupon exclusive jurisdiction is vested in the court and it may make and enter a decree enforcing, modifying, and enforcing the order as modified, or set aside, in whole or in part, the order of the board, Title 29, *supra,* §160. No provision is made in the NLR Act for a review of the order of the board by an intermediate court with judicial authority to consider all of the evidence received and proceedings taken by the board, together with additional evidence, and from the whole thereof render its independent decision as prescribed by the Minnesota Statutes heretofore cited.

Appellant in its argument has failed to give recognition to the dual nature of the proceedings of the case at bar, which encompasses the hearing before the commission as well as the hearing before the District Court. Its argument

upon the proposition that it did not receive a fair hearing is confined to the hearing before the commission. Appellant has failed to take into consideration the fact that upon the hearing before the District Court it availed itself of the right to present, and did present, all of the evidence which it desired to submit. In affirming the decision of the District Court the Supreme Court considered not only the evidence before the commission but also the evidence adduced upon the independent judicial proceeding in the District Court, and concluded, upon the record of both proceedings, that appellant had been accorded a fair hearing before the commission and the District Court.

The District Court upon an appeal from an order of the commission sits as an independent intermediate court, exercising judicial and not legislative functions, as clearly appears from a recent opinion filed on February 24, 1956.[6]

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[6] *State of Minnesota v. Chicago and Northwestern Railway Company*, 75 N. W. 2d 411. In the course of the opinion the court said "The role of the district court in reviewing an order of the commission, as prescribed by the legislature, is to determine whether the order is lawful and reasonable.[3] This function has received considerable judicial interpretation and explanation.[4] It may be summarized as the dual function of determining (1) whether the commission's findings of fact are reasonably supported by the evidence and (2) whether in light of such facts the order is reasonable and lawful.[5] Under this latter function the court must consider whether the order is compatible with the provisions of the Federal and State constitutions and laws and within the power granted the commission; whether the order is based on some mistake or misapplication of the law; or whether it is so arbitrary as to be beyond the exercise of reasonable discretion and judgment.[6] The scope of review of the district court has been properly likened to that of an appellate court in reviewing the findings of a jury.[7] The role of the Supreme Court is that of determining whether all the evidence presented, including that submitted to the commission as well as that submitted to the district court, reasonably sustains the district court's finding that the order of the commission is lawful and reasonable."[8]

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[3] *M. S. A.* §216.25. The statute also provides that the commission's findings of fact "shall be prima facie evidence of the matters therein stated" and that its order "shall be prima facie reasonable."

[4] See, e.g., *N. P. Ry. Co. v. Village of Rush City*, 230 Minn. 144, 40 N. W. 2d 886; *State and Port Authority of St. Paul v. N. P. Ry. Co.*, 229 Minn. 312, 39 N. W. 2d 752; *Twin City Motor Bus Co. v. Rechtzigel*, 229 Minn. 196, 38 N. W. 2d 825; *Arrowhead Bus Service, Inc. v. Black & White D. C. Co., Inc.*, 226 Minn. 327, 32 N. W. 2d 590; *State and Port Authority of St. Paul v. N. P. Ry. Co.*, 221 Minn. 400, 22 N. W. 2d 569; *State and R. & W. Comm. v. Minneapolis & St. L. R. Co.*, 209 Minn. 564, 297 N. W. 189; *State v. Tri-State T. & T. Co.*, 204 Minn. 516, 284 N. W. 294; *Abrahamson v. Canadian Northern Ry. Co.*, 177 Minn. 136, 225 N. W. 94; *Citizens of Pipestone v. Chicago, M. & St. P. Ry. Co.*, 167 Minn. 174, 208 N. W. 809, 209 N. W. 913; *Schain v. G. N. Ry. Co.*, 137 Minn. 157, 162 N. W. 1079; *State v. G. N. Ry. Co.*, 135 Minn 19, 159 N. W. 1089; *State v. G. N. Ry. Co.*, 130 Minn. 57, 153 N. W. 247; *Rock Island Motor Transit Co v. Murphy Motor Freight Lines, Inc.* (D. Minn.), 101 F. Supp. 978; see, 16 *Dunnell's Dig.* (3 Ed.), §8082.

[5] *State and Port Authority of St. Paul v. N. P. Ry. Co.*, 229 Minn. 312, 39 N. W. 2d 752; *Twin City Motor Bus Co. v. Rechtzigel*, 229 Minn. 196, 38 N. W. 2d 825; *State and R. & W. Comm. v. Minneapolis & St. L. R. Co.*, 209 Minn. 564, 297 N. W. 189; *State v. G. N. Ry. Co.*, 130 Minn. 57, 153 N. W. 247.

[6] *State and R. & W. Comm. v. Minneapolis & St. L. R. Co.*, 209 Minn. 564, 572, 297 N. W. 189, 193; *State v. G. N. Ry. Co.*, 130 Minn. 57, 61, 153 N. W. 247, 248. See, e.g., *State v. Thomson*, 210 Minn. 147, 297 N. W. 715, where this court held that the denial of an application to substitute "custodian service" for part-time agency service was, under the circumstances of that case, arbitrary and unreasonable.

[7] *State and Port Authority of St. Paul v. N. P. Ry. Co.*, 229 Minn. 312, 320, 39 N. W. 2d 752, 757; *State and R. & W. Comm. v. Minneapolis & St. L. R. Co.*, 209 Minn. 564, 571, 297 N. W. 189, 193; *Abrahamson v. Canadian Northern Ry. Co.*, 177 Minn. 136, 139, 225 N. W. 94, 95.

[8] *State and Port Authority of St. Paul v. N. P. Ry. Co.*, 229 Minn. 312, 39 N. W. 2d 752; *Twin City Motor Bus Co. v. Rechtzigel*, 229 Minn. 196, 38 N. W. 2d 825; *State v. Duluth, M. & I. R. Ry. Co.*, filed February 24, 1956, — Minn. —, — N. W. 2d —. No additional evidence was submitted to the district court in the instant case.

In an earlier opinion the Supreme Court examined the statutory provisions relative to the powers and duties of the commission and prior decisions of the court, and pronounced the law to be observed and applied.[7]

The "rule of necessity" (Statement, p. 23) is not applicable for the reason that the Minnesota Railroad and Warehouse Commission is composed of three members whose

[7] *State and Port Authority of St. Paul v. Northern Pacific Railway Company and Others*, 229 Minn. 312, 320: "In discharging its purely judicial function of determining whether the rates and regulations established by the commission are lawful and reasonable, the district court is governed by the statutory rule (§216.25) that *the commission's findings of fact shall be prima facie evidence of the matters therein stated, and that its order shall be prima facie reasonable, and the burden of proof upon all issues raised by the appeal shall be on the appellant.* (See, also, §216.19.) Under this rule, the district court may not, in exercising its own independent judgment, make findings in utter disregard of those of the commission. In the first place, the findings of fact by the commission are in themselves prima facie evidence of the matters therein stated, and such matters so found must be accepted by the district court as established until their prima facie foundation, in the light of the evidence as a whole, is swept away by *clear and convincing evidence to the contrary*. The presumption of reasonableness attached by §216.25 to the findings and the order of the commission is not to be treated lightly and confused with the ordinary statutory presumption which usually may be rebutted with slight evidence. 9 Am. Jur., Carriers, §90. The rule of review by the district court is the same as that of an appellate court in reviewing the findings of a jury.[6] *State and R. R. & W. H. Comm. v. M. & St. L. R. Co.*, 209 Minn. 564, 297 N. W. 189; *Abrahamson v. C. N. Ry. Co.*, 177 Minn. 136, 225 N. W. 94. The constitutional right to due process of law through an independent judicial review—pursuant to which the reviewing court, after affording the parties an opportunity to present such additional evidence as may be material, determines for itself whether the commission's order is lawful and reasonable and whether it is reasonably supported by the evidence at the time of its making—is not impaired by an application of the rule that the statutory presumption of reasonableness, after a full hearing by the commission, may be rebutted only by clear and convincing evidence."

[6] In *Steenerson v. G. N. Ry. Co.*, 69 Minn. 353, 410, 72 N. W. 713, 729, Mr. Justice Mitchell, in a concurring opinion, said:

"* * * it is only when a rate is manifestly so grossly inadequate that it could not have been fixed in the exercise of an honest and intelligent judgment that the courts have any right to declare it to be confiscatory."

duties are prescribed by statute and who act as a unit. There is no statute which provides for the disqualification of any member of the commission. The reason why we have no such statute is rather obvious for the reason that the District Court upon appeal, having the judicial powers as heretofore noted, sits as an independent and intermediate court with full authority and judicial power to receive and hear all evidence upon the issues pending, and to render decisions in accord with the statutory provisions heretofore referred to.

Appellant anchors its case in this Court upon the opinion of the Federal Court in *Berkshire Employees Ass'n v. N. L. R. B.*, 121 F. 2d 235 (Statement, pp. 20, 21), which decision is, for the reasons heretofore stated and those which follow, not here controlling. The *Berkshire* case involves a dispute arising out of the NLR Act. Appellant in its argument in regard to the decision in the *Berkshire* case again proceeds upon an erroneous hypothesis, and assumes that the court made a finding that a member of the board was biased. See last sentence occurring on page 20, appellant's statement.

The court did not make a finding that any member of the board was biased. As a matter of fact, the court made no finding of fact upon any matter. The court considered the petition of *Berkshire*, addressed to the board, requesting permission to adduce evidence as to the activities of Mr. Edwin S. Smith, a member of the board, concerning his participation in matters connected with the controversy between Berkshire and the union prior to the filing of the complaint in the case. See p. 28 (8) of opinion.

The court ordered that Berkshire's petition to adduce the additional testimony on this point be granted, and remanded the case to the board for such further proceedings. See opinion, p. 239 (11).

The observations made by the court and quoted on page 21 by appellant would seem to be obiter dictum. Apparently after the board had heard the evidence which Berkshire sought to adduce, the final order of the board would, under the provisions of the NLR Act, be subject to further review and consideration by the Circuit Court of Appeals. A further distinction arises out of the judicial powers of the District Court which as an intervening and independent court considers not only the evidence adduced before the commission but may receive additional evidence for the purpose of determining whether the statutory provisions heretofore cited had been satisfied.

The federal decisions cited by appellant on page 22 in support of the legal proposition that bias does not vitiate an administrative decision when supported by substantial evidence, is not material for the reason that the Supreme Court did not find bias on the part of any member of the commission.

Appellant must admit that upon the hearing before the District Court it had an opportunity to submit, and did submit, all of the evidence which it deemed material to its position, thereby satisfying the requirements with regard to due process.

Appellant on page 23 states:

> "* * * the Court failed to recognize that if the procedure before the Commission did not accord with due process it matters not whether the result was or was not supported by evidence."

citing *Tumey v. Ohio*, 273 U. S. 510, 535, and the *Berkshire* case, *supra*.

We have previously commented upon the *Berkshire* case, and no further comment will be made.

The question presented in the *Tumey* case is stated by Mr. Chief Justice Taft on page 514:

> "The question in this case is whether certain statutes of Ohio, in providing for the trial by the mayor of a village of one accused of violating the Prohibition Act of the State, deprive the accused of due process of law and violate the Fourteenth Amendment to the Federal Constitution, because of the pecuniary and other interest which those statutes give the mayor in the result of the trial."

No question has been raised in regard to the validity of any Minnesota Statute upon this appeal. Consequently, the *Tumey* case does not sustain appellant's right to appeal from the judgment of the Supreme Court. Furthermore, the factual situation considered in the *Tumey* case is not comparable to the facts in the instant case, and the legal questions involved in both cases are not analogous.

Appellant's contention that it did not receive a fair hearing comes as an afterthought—made and asserted in its effort to delay the restoration of passenger service to the public, and particularly to the citizens of Duluth, the Range municipalities, and the towns and stations tributary to appellant's railroad, as prescribed by the order of the commission.

Appellant did not specify denial of a fair hearing before the commission as one of its objections to the order in its notice of appeal to the District Court (Vol. I, pp. 82, 83).

Again, when stating its oral objections to the order before the District Court, it then informed the court that the *paramount objection* to the order was "lack of patronage" and a "prior outstanding order" (Vol. III, p. 1440). The Supreme Court in its opinion affirming the decision of the District Court said:

> "While the railway company lists a number of assignments of error, the appeal involves essentially the question of whether or not the order of the Railroad and Warehouse Commission is lawful and reasonable

as those terms are legally defined in our statutory and case law."
(Appendix A, *supra*, p. 31)

It therefore seems clear that appellant's claim that it did not receive a fair hearing before the commission, as it now strenuously argues, was not advanced by appellant as the important and controlling question either in the District Court or in the Supreme Court. The decisive question in the District Court was whether the order of the commission was reasonable and lawful. The essential question before the Supreme Court was whether the order is lawful and reasonable, within the statutory and case law defining those terms, and supported by the evidence adduced before the commission and before the District Court.

The decision of the Supreme Court of Minnesota is sustainable upon nonfederal grounds sufficient to support it.

We have pointed out the statutory powers and duties of the Railroad and Warehouse Commission. We have cited decisions of our Supreme Court construing these statutory provisions and the weight to be given to the findings of the commission and its order by the District Court upon appeal.

We have pointed out that the District Court, after considering the evidence adduced before the commission, together with the evidence received upon the hearing before the District Court, concluded that the order of the commission is lawful and reasonable.

We have pointed out that the essential question before the Supreme Court was whether the order of the commission was lawful and reasonable within the purview of our statutes and case law.

The opinion of the Supreme Court clearly points out that notwithstanding the injudicious remarks of a member of the commission, appellant was not prevented from presenting its evidence to the commission; that appellant was in no manner restricted in submitting to the District Court whatever evidence it desired to submit, and that the decision of the District Court upholding the order of the commission as lawful and reasonable is sustained by the evidence adduced upon the hearing before the commission and the hearing in the District Court.

In these circumstances, and upon the decisions of the District Court and the Supreme Court, we submit that the appeal herein should be dismissed, as it affirmatively appears that the decision of the Supreme Court is sustainable upon the statutory provisions, *supra*, and the decisions of our own court heretofore cited.

It likewise affirmatively appears that appellant has failed to demonstrate that the opinion of the Supreme Court, from which the appeal is taken, is not sustainable upon the statutes of Minnesota and our case law.

A recent decision of this Court, *Durley v. Mayo*, 76 S. Ct. 806, decided June 4, 1956, sustains the position and contention of appellees.

CONCLUSION

It is respectfully submitted that the appeal should be dismissed for lack of jurisdiction.

It is further respectfully submitted that since no reasonable ground for granting a petition for writ of certiorari appears, no such writ should be granted.

Respectfully submitted,

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 165

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,

Appellant,

vs.

STATE OF MINNESOTA, ORDER OF RAILWAY CONDUCTORS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF RAILROAD AND STEAMSHIP CLERKS, THE JOINT LEGISLATIVE BOARD and THE RANGE MUNICIPALITIES AND CIVIC ASSOCIATION,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

APPELLANT'S REPLY TO STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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This reply will be confined to a single question. Other points raised by Appellees in their Statement Opposing Jurisdiction and Motion to Dismiss are either covered in

Appellant's Statement as to Jurisdiction or are believed not to be material.

We would refrain therefore from response were it not that Appellees apparently contend that denial of due process in the hearing before the Commission would become immaterial in the light of Appellant's opportunity to present additional evidence before the District Court upon appeal from the Commission.

This argument lacks validity. The Supreme Court of Minnesota has made it clear in many cases, including the instant case and those therein cited, that under the existing statutes of that State a hearing before the District Court on appeal from an order of the Railroad and Warehouse Commission, even though the District Court may receive additional evidence, is a judicial review leading only to affirmance or vacation of the order below, and not a superseding legislative and administrative determination. Appellees apparently recognize this. (Motion pages 11-14)

The Supreme Court of Minnesota has stated recently:

> "The power to investigate and regulate railroad rates involves a legislative and administrative function which is exclusively vested by statute in the Railroad and Warehouse Commission. Section 216.16 and 216.19. The legislative power of rate making may in no event be exercised by the District Court. While that Court upon appeal may take evidence de novo to determine if, in the light thereof, the Commission's order was illegal or unreasonable at the time of its making, it cannot try the matter in controversy de novo and substitute its own findings for those of the Commission. * * *" *State* v. *Northern Pacific Ry. Co.*, 229 Minn. 312, 319; 39 NW 2nd 752, 756-7 (1949).

It would seem to be axiomatic, therefore, that denial of due process before the Commission would vitiate the entire

proceeding and order of the Commission and render them a nullity.

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No. 165. DULUTH, MISSABE & IRON RANGE RAILWAY Co. *v.* MINNESOTA ET AL. Appeal from the Supreme Court of Minnesota. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Donald D. Harries, Franklin B. Stevens* and *Vermont Hatch* for appellant. *Miles Lord,*

Attorney General, and *Victor J. Michaelson*, Assistant Attorney General, for the State of Minnesota, and *Gordon Rosenmeier* for the Order of Railway Conductors et al., appellees. Reported below: 247 Minn. 383, 75 N. W. 2d 398.